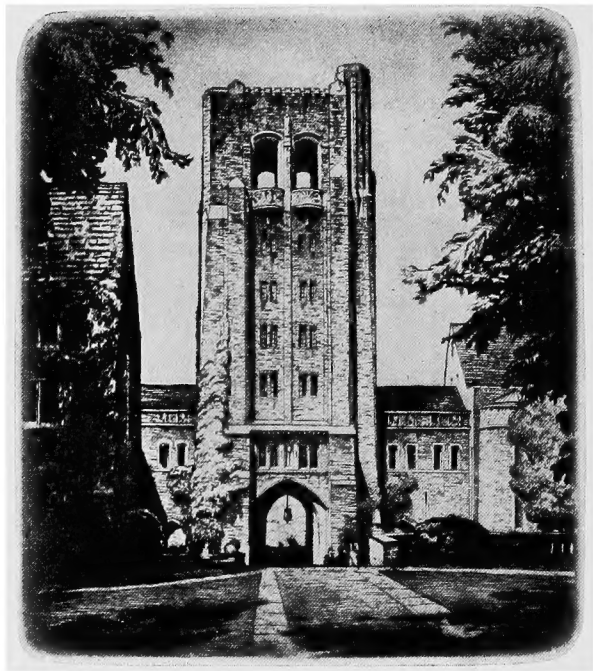


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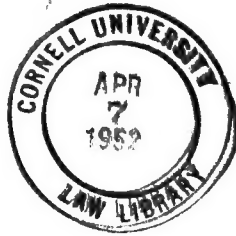
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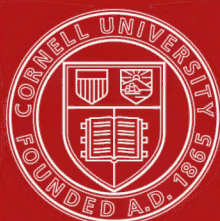
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PROBATE LAW, PRACTICE, AND FORMS,

UNDER THE LAWS OF

CALIFORNIA, OREGON, ARIZONA, IDAHO, MONTANA, NEVADA,
UTAH, WASHINGTON, AND WYOMING:

EMBRACING THE TEXT OF THE CALIFORNIA CODE OF CIVIL PROCEDURE
RELATING TO PROBATE MATTERS.

With Notes,

SHOWING THE VARIATIONS OF THE STATUTES OF THE STATES ABOVE ENUMERATED,
AND A DIGEST OF THE DECISIONS OF THE SUPREME COURTS THEREOF,
AND FORMS APPLICABLE TO PRACTICE THEREIN.

BY

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PREFACE.

DEATH frequently comes without warning, and in matters of business no person is ever prepared so that he can die leaving all things completed. The Romans invented wills, which, in a measure, enable men to provide for the completion of their life's work, and for the distribution of their accumulations among relatives and friends, as may be directed, after the death of the testator; consequently it has been found necessary by the several governments of the earth to enact laws protecting the property of those whose friends have forethought to devise their property to them. It has also been found necessary to make regulations by which the property of the careless and negligent, or of those who become so engrossed in the accumulation of wealth that they forget the future, should be protected; it was also necessary to protect the infant and those incompetent from other causes to care for themselves or their property. Thus a system of laws, complete within each of the states of the Union, have been created, and decisions of courts made interpreting and construing the same.

The decisions under these systems have grown to such proportions, that a search for them, scattered as they are through reports whose "name is legion," occupies too great a portion of the time of a busy lawyer; for in these days of telegraphs, telephones, and rapid transits, whatever is done must be done quickly.

Text-books and reports have been prepared and published covering almost every other branch of legal and equitable procedure, and some reliable and scholarly works have been published upon the probate laws and practice of different states,

but none have ever been published giving the full text of the probate laws of the Pacific group of states.

To meet this contingency, the authors have applied themselves in the preparation of this work; the text is composed of the sections of the codes of California; with these have been compared the corresponding sections of the statutes of Arizona, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming.

The similarities and dissimilarities of all these laws have been carefully noted, so that a practitioner in either of these states may at a glance decide what the differences are. If they are similar, he is enabled to take advantage of the decisions of the courts of last resort in states other than his own in his argument before his own state courts; if they are dissimilar, he still has the advantage of these decisions, as they will suggest to him reasons for conclusions he may reach as to the proper construction to be given the laws of his own state.

To further convenience the busy practitioner, *syllabi* have been prepared from the decisions of the highest courts of said states, including the latest, so that in the compass of a few pages we place before him the contents of more than two hundred volumes, so far as they relate to the matter he has in hand.

The law is accompanied with notes and forms applicable thereto, being the entire theory and practice of the law, and the experience of every lawyer will bear witness to the great convenience of such an arrangement.

With this condensation, and the forms, which have been carefully prepared with reference to the decisions of the courts, and have been made as concise as perspicuity would permit, the authors feel that they have prepared a work which will prove of great value to the practitioner in probate law.

{ THE AUTHORS.

SAN FRANCISCO, July, 1892.

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PROBATE LAW AND PRACTICE.

CHAPTER I.

OF JURISDICTION.

§ 1. Jurisdiction of court over the estate.

§ 2. When jurisdiction decided by first application.

§ 1. [1294.] Jurisdiction of Court over the Estate.

—Wills must be proved, and letters testamentary or of administration granted,—

1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died;

2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the state;

3. In the county in which any part of the estate may be, the decedent having died out of the state, and not resident thereof at the time of his death;

4. In the county in which any part of the estate may be, the decedent not being a resident of the state, and not leaving estate in the county in which he died;

5. In all other cases in the county where application for letters is first made.

“The superior courts shall have original jurisdiction . . . of all matters of probate, and of all such special cases and proceedings as are not otherwise provided for.” Cal. Code Civ. Proc., sec. 76.

Arizona. — Same as California, § 1, *supra*. Rev. Stats., sec. 966.

“The probate court of each county shall be a court of record, and shall have a clerk and a seal. The said probate court shall have the jurisdiction conferred in this act, and such other jurisdiction as shall be conferred by law. The proceedings of said courts of probate within the jurisdiction conferred on them by the laws shall be construed in the same manner and with like intendment as the proceedings of courts of general jurisdiction; and that the records, orders, judgments, and decrees of said probate courts shall have accorded to them like force and effect and legal presumptions as the records, orders, judgments, and

decrees of the district court. A probate judge shall not have any partner who is permitted to practice before him in the probate court, nor shall he be interested in any fee to be paid to any lawyer practicing before him, and any contract for any such fee shall be void." Rev. Stats., sec. 965.

"The terms of the probate court shall be holden at the county seat on the first Monday of January, April, July, and October of each year, and the judge may hold such adjourned or special terms as he shall think proper." Rev. Stats., sec. 1297.

Idaho. — Same as California, § 1, *supra*. Rev. Stats., sec. 5290.

"There must be a probate court held in each of the counties." Rev. Stats., sec. 3840.

"The probate court has jurisdiction, — 1. To open and receive proof of last wills and testaments, and to admit them to proof; 2. To grant letters testamentary, of administration and of guardianship, and to revoke the same; 3. To appoint appraisers of estates of deceased persons; 4. To compel executors, administrators, and guardians to render accounts; 5. To order sale of property of estates, or belonging to minors; 6. To order the payment of debts due from estates; 7. To order and regulate all distributions of property or estates of deceased persons; 8. To compel the attendance of witnesses, and the production of title deeds, papers, and other property of an estate or of a minor; 9. To make such orders as may be necessary to the exercise of the powers conferred upon it." Rev. Stats., sec. 3841.

"The proceedings of this court are construed in the same manner and with like intendments as the proceedings of courts of general jurisdiction, and to its records, orders, judgments, and decrees there is accorded like force, effect, and legal presumptions as to the records, orders, judgments, and decrees of district courts; *provided*, that this section shall be applicable to its probate proceedings, records, orders, judgments, and decrees only." Rev. Stats., sec. 3842.

"The terms of the probate courts in the several counties for the transaction of all probate business, except that specially authorized by law to be done in vacation, must be held on the fourth Monday in each month." Rev. Stats., sec. 3843.

"The terms of the probate courts must be held at the county seats. There shall be a clerk of said court, to be appointed by the judge thereof, or the probate judge may act as clerk of his own court. Every probate judge shall be responsible upon his official bond for every default or misconduct in office of his clerk." Rev. Stats., sec. 3844.

Montana. — Same as California, § 1, *supra*. Comp. Stats., p. 276, sec. 6.

"The probate court has jurisdiction, — 1. To open and receive proof of last wills and testaments, and to admit them to probate; 2. To grant letters testamentary, of administration and of guardianship, and to revoke the same; 3. To appoint appraisers of estates of deceased persons; 4. To compel executors, administrators, and guardians to render accounts; 5. To order the sale of property of estates, or belonging to minors; 6. To order the payments of debts due from estates; 7. To order and regulate all distributions and partitions of property or estates of deceased persons; 8. To compel the attendance of witnesses,

and the production of title deeds, papers, and other property of an estate or of a minor; 9. To exercise the powers conferred by this act; 10. To make such orders as may be necessary to the exercise of the powers conferred upon it. The proceedings of probate courts shall be construed in the same manner and with like intendments as the proceedings of courts of general jurisdiction, and to its records, judgments, and decrees there is accorded like force and effect and legal presumptions as to the records, orders, decrees, and judgments of the district courts." Comp. Stats., p. 274, sec. 1.

"The judges of probate courts may, at chambers, appoint appraisers, receive inventories and accounts to be filed in probate court, suspend the powers of executors, administrators, or guardians in the cases allowed by law, grant special letters of administration or guardianship, approve claims and bonds, and direct the issuance from the probate courts of all writs and processes necessary in the exercise of their power." Comp. Stats., p. 275, sec. 2.

"Any probate judge may hold terms, or portions of terms, in any other county than, as well as in, that for which he was elected, in cases of sickness of the proper judge, or to hear, try, adjudicate, and determine all causes and matters in which the probate judge of the proper county is interested or has been employed as an attorney, or is disqualified by law from trying or adjudicating." Comp. Stats., p. 275, sec. 3.

"When from any of the causes mentioned in the preceding section a term or part of a term of a probate court cannot be held in a county by the judge thereof, the judge disqualified may, by the consent of parties to the action or proceedings which such judge is disqualified from adjudicating, designate the county, or probate judge of some other county, to hold such term or portion of term; and if the parties fail thus to consent, a certificate of such fact of disqualification, or in case of sickness of the judge, then the fact of such sickness, must be transmitted by the clerk of such court to the governor, who must thereupon direct some probate judge of a neighboring county to hold such term or part of term." Comp. Stats., p. 275, sec. 4.

"The seal of the court need not be affixed to any proceedings therein, except, — 1. To a writ; 2. To the proof of a will or the appointment of an executor, administrator, or guardian; 3. To the authentication of a copy of a record or other proceeding of the court or officer thereof, for the purpose of being used in evidence in another court." Comp. Stats., p. 275, sec. 5.

Nevada. — Same as California, § 1, *supra*, except that in the first subdivision these words are interpolated after the words "residence at," to wit, "or immediately previous to"; and subdivisions 4 and 5 are numbered respectively 5 and 6, and the fourth subdivision is as follows: "4. In the county in which any part of his estate may be, he having died in any other county of the state." Gen. Stats., sec. 2668.

"All writs and processes issued from the probate court shall be signed by the clerk and authenticated with the seal of the court, except subpoenas, notices, and publications, which need not be under seal." Gen. Stats., sec. 2961.

"For the purpose of taking the testimony of a witness or witnesses in other counties of this territory, or in other states, territories, and countries, a com-

mission may be issued whenever, in the discretion of the court or probate judge, the same may be ordered; and when ordered, the formalities attending the issuance, execution, and return thereof shall be similar to those prescribed in the case of a commission issued from the district court, so far as the same are applicable. When issued *ex parte*, no cross-interrogation shall be necessary, unless by direction of the court or probate judge, nor shall notice be necessary unless the court or judge shall so order. The court or judge may annex cross-interrogations, or may refer the matter to a referee to be by him appointed for that purpose; and when notice is so ordered, the court or judge shall prescribe the mode of giving such notice, whether by personal service, or by posting notices, or by publication." Gen. Stats., sec. 2962.

Oregon. — "The county court has exclusive jurisdiction, in the first instance, pertaining to a court of probate, that is, — 1. To take proof of wills; 2. To grant and revoke letters testamentary, of administration and of guardianship; 3. To direct and control the conduct and settle the accounts of executors, administrators, and guardians; 4. To direct the payment of debts and legacies, and the distribution of the estates of intestates; 5. To order the sale and disposal of the real and personal property of deceased persons; 6. To order the renting, sale, or other disposal of the real and personal property of minors; 7. To take the care and custody of the person and estate of a lunatic or habitual drunkard, and to appoint and remove guardians therefor, to direct and control the conduct of such guardians, and to settle their accounts; 8. To direct the admeasurement of dower." Hill's Laws, sec. 895.

"Proof of a will shall be taken by the county court as follows: 1. When the testator, at or immediately before his death, was an inhabitant of the county, in whatever place he may have died; 2. When the testator, not being an inhabitant of this state, shall have died in the county leaving assets therein; 3. When the testator, not being an inhabitant of this state, shall have died out of the state, leaving assets in the county; 4. When the testator, not being an inhabitant of this state, shall have died out of the state, not leaving assets therein, but where assets thereafter came into the county; 5. When real property, devised by the testator, is situated in the county, and no other county court has gained jurisdiction under either of the preceding subdivisions of this section." Hill's Laws, sec. 1083.

"The business of the court (county) at each term shall be docketed and disposed of in the following order: 1. Cases at law, including motions or other proceedings connected therewith; 2. The business pertaining to a court of probate as defined and specified in section 895; 3. County business. The proceedings and records of the court pertaining to or concerning the three classifications of business specified in subdivisions of this section shall be entered and kept in separate books." Hill's Laws, sec. 903.

"The court (county) is always open for the transaction of the business mentioned in subdivision 2 of the last section, whenever the particular proceeding or transaction is authorized to be had or done without the presence of or notice to another." Hill's Laws, sec. 904.

"3. Each county court shall have a seal." Hill's Laws, sec. 920.

"The clerk of each court mentioned in section 920 shall keep the seal thereof,

and affix it to any process, transcript, certificate, or other paper required by this code or other statute." Hill's Laws, sec. 923.

"All process authorized by this code to be issued by any court or officer thereof shall run in the name of the state of Oregon, and be signed by the officer issuing the same, and if such process be issued by a clerk of a court, he shall affix thereto his seal of office." Hill's Laws, sec. 1198.

"There are no particular pleadings or forms thereof in the county court, when exercising jurisdiction in probate matters, as specified in section 895, *supra*, other than as provided in this chapter." Hill's Laws, sec. 1077.

"The mode of proceeding is in the nature of that in a suit in equity as distinguished from an action at law. The proceedings are in writing, and are had upon the application of a party or the order of the court. The court exercises its powers by means of, — 1. A citation to the party; 2. An affidavit or the verified petition or statement of a party; 3. A subpoena to a witness; 4. Orders and decrees; 5. An execution or warrant to enforce them." Hill's Laws, sec. 1078.

Power of court is wholly statutory means provided in this section: *Wright v. Edwards*, 10 Or. 301. and is brought into action only by the

"The proceedings in probate matters shall be entered and recorded in the following books: 1. A register, in which shall be entered a memorandum of all official business transacted by the court or judge thereof, appertaining to the estate of each person deceased, under the name of such person; that pertaining to the guardianship of an infant, under the name of such infant; that pertaining to an insane person or a drunkard, under his name; 2. A record of wills, in which shall be recorded all wills proven before the court or judge thereof, with the order of probate thereof, and of all wills proved elsewhere upon which letters of administration are issued by direction of such court or judge; 3. A record of the appointment of administrators, whether general or special, or of a partnership and of executors; 4. A record of the appointment of guardians of infants, insane persons, and drunkards; 5. A record of accounting and distribution, in which shall be entered a summary balance sheet of the accounts of administrators, executors, and guardians, with the orders and decrees relating to the same; a memorandum of executions issued thereon, with a note of satisfaction when satisfied; also orders and decrees relating to the sale of real property, and to the distribution of the proceeds thereof; and notices of all money or securities paid or deposited in court as proceeds of such sales or otherwise; and a statement showing the names of creditors, and the debts established and entitled to distribution, the amount to which each person is entitled out of such funds, and the amount actually paid to each person, and when paid; 6. A record of the appointment of admeasurer of dower, with all orders and decrees relating to the same, and the admeasurer's report; 7. An order-book, in which shall be entered orders directing the conduct of executors, administrators, or guardians; orders for publication of notice to creditors; orders in behalf of creditors directing debts to be paid, or allowing an execution to be issued; appointments of special guardians, appraisers, and referees; order relating to the production of a will, to removal of executors, administrators, or guardians, or to sureties

therefor, and generally, all other orders not required to be entered in some other book." Hill's Laws, sec. 1079.

"To each of such books there shall be attached an index, securely bound in the volume, referring to the entries or records in alphabetical order, under the name of the person to whose estate or business they relate, and naming the page of the book where the entry or record is made." Hill's Laws, sec. 1080.

"Orders or decrees for the payment of money may be enforced by execution or otherwise, in the same manner as orders or decrees for the payment of money in the circuit court." Hill's Laws, sec. 1082.

Utah. — Same as California, § 1, *supra*. Comp. Laws, sec. 3988.

"The probate court has jurisdiction: 1. In the settlement of the estates of decedents, and in matters of guardianship and other like matters; 2. . . . 3. To make such orders as may be necessary to the exercise of the powers conferred upon it." Comp. Laws, sec. 3015.

"The probate proceedings, records, orders, judgments, and decrees of this court are construed in the same manner, and with like intendments, as the proceedings in courts of general jurisdiction, and to them there is accorded like force, effect, and legal presumptions as to the records, orders, judgments, and decrees of the district court." Comp. Laws, sec. 3016.

"The probate courts shall always be opened for transaction of business, but regular sessions thereof shall be held as follows: In the county of Salt Lake on the second and fourth Mondays of each month; in the counties of Cache, Webber, Utah, and San Pete on the second Monday of each month; and in the remaining counties on the second Monday of March, June, September, and December of each year; each session shall continue until all the business then ready for hearing is disposed of." Comp. Laws, sec. 3017.

"The terms of the probate court must be held at the county seat." Comp. Laws, sec. 3018.

Washington. — Same as California, § 1, *supra*, except that subdivisions 4 and 5 are omitted. Code Proc., sec. 851.

"The superior courts, in the exercise of their jurisdiction of matters of probate, shall have power, — 1. To take proof of will, and to grant letters testamentary and of administration, and to bind apprentices as by law provided; 2. To settle the estates of deceased persons, and the accounts of executors, administrators, and guardians; 3. To allow or reject claims against the estates of deceased persons as hereinafter provided; 4. To hear and determine all controversies between masters and their apprentices; 5. To award process, and cause to come before them all persons whom they may deem it necessary to examine, whether parties or witnesses, or who, as executors, administrators, or guardians, or otherwise, shall be intrusted with or in any way accountable for any property belonging to a minor, orphan, or person of unsound mind, or estate of any deceased person; 6. To order and cause to be issued all writs which may be necessary to the exercise of their jurisdiction." Code Proc., sec. 845.

"All orders, settlements, trials, and other proceedings in probate shall be

had or made in the county in which letters testamentary or of administration were granted." Code Proc., sec. 853.

"The judges of the superior court may, at chambers, appoint appraisers, receive inventories and accounts, suspend the powers of executors, administrators, or guardians in the cases allowed by law, grant letters of administration or guardianship, approve claims and bonds, and direct the issuance of all writs and process necessary in the exercise of their powers." Code Proc., sec. 847.

"There shall be kept in the office of the clerk of the superior court the following books of record of probate matters: 1. A journal, in which shall be entered all orders, decrees, and judgments made by the court, or the judge thereof, and the minutes of the court in probate proceedings; 2. A record of wills, in which shall be recorded all wills admitted to probate; 3. A record of letters testamentary and of administration, in which all letters testamentary and of administration shall be recorded; 4. A record of bonds, in which all bonds and obligations required by law to be approved by the court or judge in matters of probate shall be recorded; 5. A record of petitions, in which all petitions for orders of sale of real estate shall be recorded; 6. A record of claims, in which at least one page shall be given to each estate or case, wherein shall be entered, under the title of each estate or case, in separate columns properly ruled, (1) the names of claimants against the estate, (2) the date of filing proof of claim, (3) the amount claimed, (4) the amount allowed, (5) the date of allowance, (6) the nature of the claim, (7) the amount paid, (8) number of the voucher for each payment, (9) the date of filing the voucher; 7. A memorandum of the files, in which at least one page shall be given to each estate or case, wherein shall be noted each paper filed in the case, except proof of claims and vouchers noted in record of claims, and the date of filing each paper; 8. A record of marriages, in which certificates of all marriages solemnized in the county shall be recorded." Code Proc., sec. 846.

Wyoming. — Same as California. Laws 1890-91, p. 245, sec. 1.

"The district court of this state shall have exclusive original jurisdiction of all matters relating to the probate and contest of wills and testaments, the granting of letters testamentary and of administration, and the settlement and distribution of decedents' estates. The court granting the letters shall have exclusive jurisdiction of all matters touching the settlement and distribution of the estates whereon such letters have been granted." Laws 1890-91, p. 243, sec. 1.

"For the purpose of granting probate of wills, issuing letters testamentary and of administration, filing reports, accounts, and petitions of executors and administrators, filing claims against the estate, and issuing process and notices required by this act, the court shall be kept open in the vacation thereof, and the business pertaining thereto, done by the court commissioners and the clerk, shall be subject to the supervision of the court at the next ensuing term." Laws 1890-91, p. 243, sec. 2.

"The judges of the district courts within their respective jurisdiction, and the court commissioners within the counties to which they shall be appointed, shall have the power to make orders in vacation for the sale of personal prop-

erty at public or private vendue, for the compounding of debts, for the settlement of an estate as insolvent, for the approval of bonds, and all such other orders of an *ex parte* nature as may facilitate the settlement of estates. Such orders shall be in writing, signed by the judge or commissioner issuing the same, and shall be by the clerk filed and recorded as a vacation entry in the proper record." Laws 1890-91, p. 243, sec. 3.

"The court commissioner of each district court appointed under the law shall, upon the order of the court or judge thereof in vacation, or upon a general order made for that purpose, examine the bonds filed by the executors and administrators, with a view to ascertaining their sufficiency, and have power to approve the same; examine any inventory, sale bill, account current, except final accounts and vouchers filed therewith, or examine into the condition of an estate generally. In order to make such examination, he shall be entitled to process to compel the executor or administrator and other witnesses to appear and testify before him on the hearing, and the production of books, papers, moneys, or other things pertinent to the matter to be heard. Any person refusing to appear or testify in vacation may be attached for contempt and held to bail to answer to the alleged contempt at the next term of court. The said commissioner shall report his finding upon the matter or matters referred to, in writing, to the court for its action. Exception may be filed to the report, which shall be heard and determined as in other cases. The commissioner shall be allowed such compensation for his services in all these matters as may be fixed by law, which shall be taxed as costs against the estate." Laws 1890-91, p. 244, sec. 4.

"All proceedings touching the probate of wills, the settlement of decedents' estates, shall be recorded in separate books kept for that purpose; *provided*, that proceedings touching the guardianship of infants and insane persons may be recorded therein. The clerk of the district court in each county shall keep in his office a book for the recording of wills and probate thereof; a book in which he shall record all letters testamentary and of administration within ten days after the same are issued; a book in which he shall record all inventories, sale bills of personal estate, within thirty days after the same are filed; a general entry, claim, and allowance docket combined, and for noting fees. He shall also make up for the use of the court at such term a probate docket, in which he shall note all appointments made in vacation; all pending petitions for the sale of real estate, indicating the parties thereto; all pending petitions for the release of sureties and removal of executors or administrators, or for other purposes; all reports and accounts filed in vacation; all claims against the estate pending for trial at such term; all delinquencies of executors and administrators to discharge any duty in the manner or within the time required by law or order of the court; and for the furnishing of this record, as above required, the said court commissioners shall be equally bound. Said clerk shall keep a book for the purpose of entry of the inventory, appraisement, and all claims allowed, including costs, and of the final distribution of such estate, being for the purpose of showing a summary of the final settlement thereof." Laws 1890-91, p. 244, sec. 5.

Powers of Judge at Chambers. — California: Code Civ. Proc., sec. 167; Arizona: Rev. Stats., sec. 975; Idaho: Rev. Stats., sec. 5828; Montana: Comp.

Stats., sec. 2, Prob. Act, *supra*; Nevada: Gen. Stats., sec. 2449; Oregon: Hill's Laws, 915-919; Utah: Comp. Laws, secs. 3051-3053; Washington: Code Proc., sec. 847, *supra*; Wyoming: Laws 1890-91, p. 243, sec. 3, p. 244, sec. 4, *supra*.

The probate court is a court of special and limited jurisdiction. Most of its general powers belong peculiarly and originally to the court of chancery, which still retains all of its jurisdiction: *Wilson v. Roach*, 4 Cal. 362; *Clark v. Perry*, 5 Cal. 58; *Deck v. Gerke*, 12 Cal. 433; *Griggs v. Clark*, 23 Cal. 427; *Sanford v. Head*, 5 Cal. 297.

The superior court has the power to hear and determine in proper cases questions relating to the rights and duties of executors and beneficiaries under wills which have been admitted to probate: *Williams v. Williams*, 73 Cal. 99; *Rosenberg v. Frank*, 58 Cal. 387; *Payne v. Payne*, 18 Cal. 291; *Deck v. Gerke*, 12 Cal. 433.

A probate court has power to set aside its own judgments obtained *ex parte*: *In re Sullenberger*, 72 Cal. 549.

The constitution does not confer jurisdiction of all matters relating to the estates of deceased persons on the probate court, but over such matters only as the statute directs it to exercise jurisdiction: *Bush v. Lindsey*, 44 Cal. 121; *Smith v. Andrews*, 6 Cal. 652; *Grimes v. Norris*, 6 Cal. 621; *Haynes v. Meeks*, 10 Cal. 110; *Townsend v. Gordon*, 19 Cal. 188.

By an act in 1858 the legislature of California made the probate court a court of superior jurisdiction, and from the date of this change the above decisions do not apply to proceedings in said court. Said act was approved March 27, 1858 (Stats. 1858, p. 95), and the same provisions have been incorporated into the codes.

Probate courts are courts of record, and the same presumptions as to jurisdiction attach as in case of other courts of record: *Irwin v. Scriber*, 18 Cal. 499; *Brodrick v. Tibbits*, 63 Cal. 80.

Proceedings for the administration and distribution of the estates of deceased persons are purely statutory; and though the superior court is a court of general jurisdiction, yet, while sitting as a court of probate, its jurisdiction is limited and special, and all acts in excess of the statutory power conferred are nugatory, and do not bind those who have

invoked its authority or submitted to its decision: *Smith v. Westerfield*, 88 Cal. 374.

Under the code of Washington Territory, section 1444, the probate court had jurisdiction to grant administration upon a decedent's estate, where the only property in the territory belonging to the decedent consisted of real estate, and there was no creditors of the estate, and the decedent's estate was in course of administration in another state: *Hanford v. Davies*, 1 Wash. 476.

The probate court has no jurisdiction to try the title to real estate as between the representatives of an estate and the husband of the decedent, where the latter claims an interest adverse thereto: *Stewart v. Lohr*, 1 Wash. 341.

Where a probate court had no jurisdiction of the subject-matter of an action, the higher courts could get no jurisdiction on appeal: *Stewart v. Lohr*, 1 Wash. 341.

When the probate court has jurisdiction of the subject-matter, all intendments are, under the statutes of California, in favor of the correctness of the action of the court, the same as in other courts of record: *Lucas v. Todd*, 28 Cal. 182.

If the superior court has jurisdiction of an action for the construction of a will, it may refuse to exercise it in an action brought to have plaintiff's heirship determined, and to declare certain legacies void, where plaintiffs are not mentioned in the will, and no special reason is shown for the intervention of equity or for the adjudication asked, prior to final distribution: *Siddall v. Harrison*, 73 Cal. 560; *Goldtree v. Thompson*, decided upon the authority of *Siddall v. Harrison*, *supra*, October, 1887, not reported.

Probate court has jurisdiction to interpret a devise in trust; to pass upon its legality; to ascertain the parties entitled thereunder; and to distribute accordingly: *In re Hinckley*, Myrick's Prob. 189.

The late probate courts had no power, save in certain excepted cases,

to settle disputes between the heirs or personal representatives of a deceased person and third persons: *Theller v. Such*, 57 Cal. 447; *Bath v. Valdez*, 70 Cal. 350; *Barnard v. Wilson*, 75 Cal. 512.

If all the members of a partnership die, whether within the jurisdiction of the same or of different probate courts, the assets, debts, and credits of the partnership do not become confused with the estate of the last survivor, but continue a separate existence, and the rights of the representatives or successors of the several partners can only be determined in a court of equity: *Theller v. Such*, 57 Cal. 447.

The probate jurisdiction of the superior court is separate and distinct from its jurisdiction in ordinary civil actions: *In re Algier*, 65 Cal. 228.

A superior court as a court of equity may set aside a decree of the superior court in probate matters, when it appears that the decree was obtained by fraud, and without notice to the party against whom it was rendered: *Baker v. O'Riordan*, 65 Cal. 368.

Proceedings in the course of administration of the estate of a deceased person cannot be collaterally attacked except for want of jurisdiction in the court: *Dennis v. Winter*, 63 Cal. 16.

The probate court does not lose its jurisdiction over a subject of which it has taken cognizance, by adopting a proceeding whereby it may determine the issue adversely; it has jurisdiction to try and determine issues of fact: *Pond v. Pond*, 10 Cal. 495.

A court of law cannot set aside a homestead, and the superior court when acting as such cannot exercise its probate functions: *Richards v. Wetmore*, 66 Cal. 365.

Probate courts have exclusive jurisdiction to compel an executor to account for personal property that came into his hands: *Auguisola v. Arnaz*, 51 Cal. 435; but cannot compel an administrator to convey to the heirs property held in trust: *Haverstick v. Trudel*, 51 Cal. 431; nor order sale of real estate on an imperfect petition by one not legally appointed administrator: *Pryor v. Downey*, 50 Cal. 389.

Probate courts have no jurisdiction to enforce a trust: *Haverstick v. Trudel*, 51 Cal. 431.

The probate court has no power to authorize an administrator to assign a bond of indemnity given to his intestate in his life-time as sheriff: *McDermott v. Mitchell*, 53 Cal. 616.

Determination of residence of deceased: *In re Austin*, Myr. Prob. 237; *In re Samuel*, Myr. Prob. 228; *In re Millikin*, Myr. Prob. 88.

Residence as a jurisdictional requirement may be inquired into at any time in a direct proceeding for revocation of letters: *In re Millikin*, Myr. Prob. 88.

Death of intestate and his residence within the county where the court is located are jurisdictional facts, and without their existence the court cannot proceed: *Beckett v. Selover*, 7 Cal. 215; *Abel v. Love*, 17 Cal. 233; *Haynes v. Meeks*, 10 Id. 110; *In re Harlan*, 24 Cal. 182.

If after the death of a person that portion of the county in which he resided is erected into a new county, the probate court of the old county has jurisdiction over the administration of his estate: *In re Harlan*, 24 Cal. 182.

When the record recites the mode adopted to acquire jurisdiction over the person in a probate proceeding, it will not be presumed something different was done: *Pearson v. Pearson*, 46 Cal. 610.

Where the record is silent as to the manner of acquiring jurisdiction, it will be presumed to have been properly acquired: *Hahn v. Kelly*, 34 Cal. 391.

When the jurisdiction of the probate court once attaches, all subsequent acts of the court are the exercise of jurisdiction over the subject-matter, and over all persons who have been brought properly before it: *Haynes v. Meeks*, 10 Cal. 110.

Probate courts have no jurisdiction to administer upon the estates of persons who died prior to the adoption of the constitution: *Downer v. Smith*, 24 Cal. 114.

Administration on the estate of a live person is void: *Stevenson v. Superior Court*, 62 Cal. 60.

One sentenced to state prison for a term less than his natural life is not dead in law: *In re Nerac*, 35 Cal. 392.

Jurisdiction of district court in matters cognizable in probate courts is

wholly appellate: *Territory v. Forrest*, 1 Ariz. 49.

District courts have no power to appoint administrators of estates of deceased persons. In probate matters their jurisdiction is purely appellate. The power to appoint administrators belongs exclusively to the probate courts: *Territory v. Mix*, 1 Ariz. 52.

Probate courts have only special and limited jurisdiction: *Ethell v. Nichols*, 1 Idaho, 741.

Jurisdiction of the probate court being once established, every intendment is in its favor, the same as in cases of courts of general jurisdiction: *Glendenning v. McNutt*, 1 Idaho, 592.

Jurisdiction of probate courts.

— For discussion of this subject, see *Deer Lodge Co. v. Kohrs*, 2 Mont. 66.

Probate courts not having chancery powers have no authority to entertain a petition involving the construction of a will: *Chadwick v. Chadwick*, 6 Mont. 66.

Although the same court has jurisdiction under our system of cases at law, in equity, and in matters of probate, yet the several classes of cases must be kept separate, and a petition to the court of probate cannot be confounded with an action at law or a suit in chancery: *Lucich v. Medin*, 3 Nev. 93.

Where a probate court has jurisdiction and can administer full relief, it is in the discretion of a court of equity to assume jurisdiction or turn the parties over to the probate court: *Corbett v. Rice*, 2 Nev. 330.

When others than the decedent are necessary parties to a foreclosure suit, the proceedings cannot be in the probate court, but must be in equity. When only the mortgagee and the representatives of the deceased mortgagor are parties, the probate court and equity courts have concurrent jurisdiction: *Corbett v. Rice*, 2 Nev. 330.

The county court has exclusive jurisdiction to grant and revoke letters testamentary, etc.: *Ramp v. McDaniel*, 12 Or. 108.

Judgments of county court acting in probate matters import absolute

verity, and cannot be collaterally attacked, but may be impeached by evidence appearing on the face of the record, showing a want of jurisdiction: *Tustin v. Gaunt*, 4 Or. 305; *Holmes v. O. & C. R. R. Co.*, 6 Saw. 262; *Hubbard v. Hubbard*, 7 Or. 42; *Jones v. Done*, 6 Or. 189.

In probate proceedings the county court is to be regarded as a superior jurisdiction, as it derives its powers as probate court from the constitution and is a court of record: *Russell v. Lewis*, 3 Or. 380; *Tustin v. Gaunt*, 4 Or. 305; *Monastes v. Catlin*, 6 Or. 119; *Holmes v. O. & C. R. R. Co.*, 6 Saw. 262; *Gager v. Henry*, 6 Saw. 237.

The probate powers of the county court are enlarged, limited, or varied by the statute, but not created: *Ramp v. McDaniel*, *supra*.

County courts in Oregon when acting as courts of probate are courts of general jurisdiction: *Holmes v. O. & C. R. R. Co.*, 7 Saw. 380; 6 Saw. 262; *Gager v. Henry*, 5 Saw. 237.

Residence of decedent, at the time of his death, is a jurisdictional fact upon which the issuance of letters of administration must be based: *Holmes v. O. & C. R. R. Co.*, 7 Saw. 380; 6 Saw. 262.

Probate courts are vested with exclusive original jurisdiction of all matters pertaining to the settlement of estates, and although the district court under its general equity powers may entertain a suit for the construction of a will, it cannot execute it: *Allen v. Barnes*, Utah Sup. Ct., February 2, 1887.

Probate courts are inferior tribunals, and jurisdiction cannot be inferred; it must be given to them by positive law: *Cast v. Cast*, 1 Utah, 112.

If probate court assumes jurisdiction over property, it is *prima facie* evidence that it was then in the county to which such court belongs and within the jurisdiction of the court: *McCoy v. Ayers*, 2 Wash. 203.

Our courts cannot recognize the personal representative of a deceased person, unless he be clothed with authority derived from the laws of this territory: *Barlow v. Cogan*, 1 Wash. 257.

§ 2. [1295.] When Jurisdiction Decided by First Application.— When the estate of the decedent is in more

than one county, he having died out of the state, and not having been a resident thereof at the time of his death, or being such non-resident and dying within the state and not leaving estate in the county where he died, the superior court of that county in which application is first made for letters testamentary or of administration has exclusive jurisdiction of the settlement of the estate. [Amendment approved April 16, 1880; took effect immediately.]

Arizona. — Same. Rev. Stats., sec. 967.

Idaho. — Same. Rev. Stats., sec. 5291.

Montana. — Same. Comp. Stats., p. 276, sec. 7.

Nevada. — Same. Gen. Stats., sec. 2669.

Utah. — Same. Comp. Laws, sec. 3989.

Washington. — Same. Code Proc., sec. 852.

Wyoming. — Same. Laws 1890-91, p. 245, sec. 2.

A decree of one probate court has already granted letters of administration of the estate, the decedent having been a non-resident, and having died outside of the territory, because the owner died intestate, leaving no kindred or wife, is void, where leaving property in both counties: the probate court of another county *Territory v. Klee*, 1 Wash. 183.

CHAPTER II.

OF THE PROBATE OF WILLS.

ARTICLE I. PETITION, NOTICE, AND PROOF.

II. CONTESTING PROBATE OF WILL.

III. PROBATE OF FOREIGN WILLS.

IV. CONTESTING WILL AFTER PROBATE.

V. PROBATE OF LOST OR DESTROYED WILL.

VI. PROBATE OF NUNCUPATIVE WILLS.

ARTICLE I.

PETITION, NOTICE, AND PROOF.

- § 3. Custodian of will to deliver same to whom — Penalty.
- § 4. Who may petition for probate of will.
- § 5. Contents of petition.
- § 6. When executor forfeits right to letters.
- § 7. Will to accompany petition, or its presentation prayed for, and how enforced.
- § 8. Notice of petition for probate, how given.
- § 9. Heirs and named executors to be notified, how.
- § 10. Petition may be presented to judge at chambers, and what judge may do.
- § 11. Hearing proof of will after proof of service of notice.
- § 12. Who may appear and contest the will.
- § 13. Probate, when no contest.
- § 14. Olographic wills.

§ 3. [1298.] Custodian of Will to Deliver Same to Whom. — Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the superior court having jurisdiction of the estate, or to the executor named therein. A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by any one injured thereby. [Amendment approved April 16, 1880; took effect immediately.]

Arizona. — Same. Rev. Stats., sec. 968.

Idaho. — Same. Rev. Stats., sec. 5296.

Montana. — Same. Comp. Stats., p. 277, sec. 8.

Nevada. — “Any person having the custody of any will shall, within thirty days after he shall have knowledge of the death of the testator, deliver it into the probate court which has jurisdiction of the case, or to the person named in the will as executor.” Gen. Stats., sec. 2670.

"Any person named as executor in any will shall, within thirty days after the death of the testator, or within thirty days after he has knowledge that he is named executor, present the will, if in his possession, to the probate court." Gen. Stats., sec. 2671.

Same as last sentence of California, § 3, *supra*. Gen. Stats., sec. 2673.

Utah. — Same as California, § 3, *supra*. Comp. Laws, sec. 3990.

Washington. — Same as Nevada Gen. Stats., sec. 2670, *supra*. Code Proc., sec. 854.

"Any person violating either of the next three preceding sections without reasonable excuse shall be liable to every person interested in the will, for damages caused by such neglect." Code Proc., sec. 857.

Wyoming. — Same as California. Laws 1890-91, p. 245, sec. 3.

Arizona. — Same. Rev. Stats., sec. 969.

Idaho. — Same. Rev. Stats., sec. 5297.

Montana. — Same. Comp. Stats., p. 278, sec. 9.

Nevada. — "Any person having an interest in the will may, in like manner, present a petition, praying that it may be required to be produced and admitted to probate." Gen. Stats., sec. 2675.

Utah. — Same as California, § 4, *supra*. Comp. Laws, sec. 3991.

Washington. — "Any person named as executor in any will shall, within thirty days after he has knowledge that he is executor, present the will, if in his possession, to the superior court which has jurisdiction." Code Proc., sec. 855.

"Any person having an interest in the will may, in like manner, present a petition, praying that it may be required to be produced and admitted to probate." Code Proc., sec. 859.

Wyoming. — Same as California. Laws 1890-91, p. 245, sec. 4.

§ 4. [1299.] Who may Petition for Probate of Will.

— Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state, or a nuncupative will.

Probating of wills of persons dying before the passage of the California statute is not required: *Grimes v. Norris*, 6 Cal. 621.

An executor is a person to whom the deceased has confided the execution of his last will. He derives his

appointment from the will, and upon it his authority is grounded. Letters testamentary are but the authentic evidences of the power conferred by the will: *Holladay v. Holladay*, 16 Or. 147.

§ 5. [1300.] **Contents of Petition.** — A petition for the probate of a will must show,—1. The jurisdictional facts; 2. Whether the person named as executor consents to act, or renounces his right to letters testamentary; 3. The names, ages, and residence of the heirs and devisees of the decedent, so far as known

to the petitioner; 4. The probable value and character of the property of the estate; 5. The name of the person for whom letters testamentary are prayed. No defect of form, or in the statement of jurisdictional facts actually existing, shall make void the probate of a will. [Amendment approved March 24, 1884: took effect July 1, 1884.]

Arizona. — Same. Rev. Stats., sec. 970.

Idaho. — Same. Rev. Stats., sec. 5298.

Montana. — Same. Comp. Stats., p. 278, sec. 10.

Nevada. — "If he intends to decline the trust, he shall, at the same time, file his renunciation in writing. If he shall neglect for ten days to file his renunciation, such neglect shall be equivalent to a renunciation, unless for cause shown the probate court or judge shall extend the time. If he intends to accept, he shall present, with the will, a petition setting forth the facts necessary to give jurisdiction, and when the same are known, the names, ages, and residence of the heirs and devisees of the deceased, and the probable value and character of the property of the estate, and praying that the will be admitted to probate, and that letters testamentary be issued to him. If the jurisdictional facts existed, but are not fully set forth in the petition, and the same shall be afterwards proved in the course of the administration, the probate of the will and the subsequent proceedings shall not, on account of such want of jurisdictional averments, be held void." Gen. Stats., sec. 2672.

Oregon. — "In an application to prove a will, or for the appointment of an executor or administrator, the petition shall set forth the facts necessary to give the court jurisdiction, and also state whether the deceased left a will or not, and the names, age, and residence, so far as known, of his heirs." Hill's Laws, sec. 1092.

Utah. — Same as California, § 5, *supra*. Comp. Laws, sec. 3992.

Washington. — "An executor named in the will may decline to act by filing a written renunciation at the time of filing said will; but if he intends to accept, he shall present, with the will, a petition praying that the will be admitted to probate, and that letters testamentary be issued to him." Code Proc., sec. 856.

Wyoming. — Same as California. Laws 1890-91, p. 245, sec. 5.

A petition for the probate of a will need not state whether it is an olographic or other species of will, nor will any defect of form, or in the statement of the jurisdictional facts actually existing, make void the probate of a will; but the court is to admit the will to probate or not, under all the facts shown in evidence. *In re Learned* 67 Cal. 140; see *Moore v. W. T. & L. Co.*, 7 Or. 359; *Holmes v. O. & C. R. R. Co.*, 7 Saw. 380.

Form No. 1. — Caption.

In the — court of the — county of — state of —
Department No. —.

In the matter of the estate of —, deceased.

To the honorable — court of the — county of —

The petition of — respectfully represents.

Form No. 2. — Petition for Probate of Will.[Caption, Form No. 1, § 5, *ante*.]

1. That — died on or about the — day of —, A. D. 18—, at —, county of —, state of —, and was at the time of his death a resident of the — county of —, state of —; that he left a last will and testament, which is herewith presented to this court for probate; that petitioner is interested in the estate of decedent, being a legatee (heir at law, or state any other interest which the petitioner has) of said decedent.

2. That — is the person named as executor in said will, and he consents to act as such (but renounces his right to letters testamentary).¹

3. That the names, ages, and residences of the heirs of said decedent, so far as known to your petitioner, are as follows, viz.: —, the widow of decedent, aged — years, residence —, etc.; and the names, ages, and residences of his devisees and legatees are as follows, so far as known to your petitioner, viz.: —, aged — years, residence —, etc.

4. That said decedent left personal property of the probable value of \$—, and the following described real estate, to wit (here insert description).

5. That said real estate is of the probable value of \$—; that all of said property is situated in the — county of —, in this state, and is the separate property of decedent (that all of said property is the community property of decedent and —, his widow).

Wherefore petitioner prays that said will be admitted to probate, and that letters testamentary thereon be issued to —, the person named in said will as executor.²

—, Petitioner.

—, Attorney for Petitioner.

¹ In case no one is named in the will as executor, in lieu of this allegation, state "that no one is named in said will as the executor thereof"; or if the person who is named as executor should be incompetent to act from any cause, state that fact.

² In case the person named in the will as executor renounces his right to letters, or for any cause they cannot be issued to him, this clause should be as follows: "and that letters of administration with the will annexed be issued to —."

Form No. 3.—Renunciation of Trust by Person Named in the Will as Executor.

[Title of Court and Estate.]

The undersigned, one of the persons named as executors in the last will and testament of —, deceased, respectfully renounces his right to letters testamentary under said will, and declines to act as the executor of said last will and testament.

Dated —.

§ 6. [1301.] When Executor Forfeits Right to Letters.—If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition the proper court for the probate of the will, and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown.

Arizona.—Same. Rev. Stats., sec. 971.

Idaho.—Same. Rev. Stats., sec. 5299.

Montana.—Same. Comp. Stats., p. 278, sec. 11.

Nevada.—See Gen. Stats., sec. 2672, under last section.

Utah.—Same. Comp. Laws, sec. 3993.

Wyoming.—Same. Laws 1890-91, p. 246, sec. 6.

If one only of two executors applies for letters, and the petition does not disclose the residence of the co-executor, and no citation to him is issued, it will not be assumed, for the purpose of invalidating the probate, that the co-executor was a resident of the county in which the petition was filed: *McOrea v. Harasethy*, 51 Cal. 146.

For renunciation, see Form No. 3, under the last section.

§ 7. [1302.] Will to Accompany Petition, or its Presentation Prayed for, and how Enforced.—If it is alleged in any petition that any will is in the possession of a third person, and the court is satisfied that the allegation is correct; an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time named in the order. If he has possession of the will and neglects or refuses to produce it in obedience to the order, he may by warrant from the court be committed to the jail of the county, and be kept in close confinement until he produces it.

Arizona.—Same. Rev. Stats., sec. 972.

Idaho.—Same. Rev. Stats., sec. 5300.

Montana. — Same. Comp. Stats., p. 278, sec. 12.

Nevada. — “Any person named as executor in a will, though the will is not in his possession, may present his petition to the probate court which has jurisdiction, praying that the person in possession of the will may be required to produce it, that it may be admitted to probate, and that letters testamentary may be issued to him.” Gen. Stats., sec. 2674.

“Any person having an interest in the will may, in like manner, present a petition, praying that it may be required to be produced and admitted to probate.” Gen. Stats., sec. 2675.

“If it be alleged in any petition that any will is in the possession of a third person, and the court shall be satisfied that the allegation is correct, an order shall be issued and served upon the person having possession of the will, requiring him to produce it at a time to be named in the order.” Gen. Stats., sec. 2676.

“If he has possession of the will, and neglects or refuses to produce it in obedience to the order, he may, by warrant from the court, be committed to the jail of the county, and be kept in close confinement until he shall produce the will.” Gen. Stats., sec. 2677.

Utah. — Same. Comp. Laws, sec. 3494.

Washington. — Same as Nevada Gen. Stats., sec. 2674, *supra*. Code Proc., sec. 858.

See § 4, *ante*. Code Proc., sec. 859.

“The said court may compel, by citation and attachment, any person in whose possession any will may be, to produce it in court at such time as the court may order.” Code Proc., sec. 860.

“Applications for the probate of a will, or for letters testamentary, may be made to the judge of the superior court, and he may also at any time issue all necessary orders and process to enforce the production of any will.” Code Proc., sec. 861.

Wyoming. — Same as California.

Contempt. — Cal. Code Civ. Proc., secs. 1209, 1219.

Orders, etc. — See §§ 314, 335, *post*.

Citations. — See §§ 317, 321, *post*.

Form No. 4.—Petition for Production and Probate of Will where it is in Possession of a Third Party.

[Caption, Form No. 1, § 5, *ante*.]

1. That — died on or about the — day of —, 18—, at —, county of —, state of —, and was at the time of his death a resident of the county of —, state of —; that he left a last will and testament, which is in the hands of —, and has never been presented for probate; that petitioner is the widow (state other interests) of deceased, and is interested in the estate of decedent.

(If the facts stated in subd. 2 of Form No. 2, § 5, *ante*,

are known, state them as in said form; if they are unknown, state as follows:)

2. That the name of the person nominated in said will as executor is unknown to petitioner, and petitioner cannot state whether such person consents to act as such, or renounces his right to letters testamentary.

(Follow subd. 3 in said Form No. 2 if the facts are known; but if the names, ages, and residence of the heirs and devisees are not known, that fact may be stated.)

(Follow subds. 4 and 5 of said Form No. 2.)

Wherefore, petitioner prays that a day be fixed for the hearing of this petition; that due and legal notice thereof be given; that an order be forthwith issued to the said —, requiring him to produce said last will and testament of said decedent at the time of the hearing of this petition; that upon said hearing and the production of said will in court, it be admitted to probate, and that letters testamentary thereon be issued to —, the person named in said will as executor.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 5.—Order Requiring a Person having Possession of a Will to Produce it.

[Title of Court and Estate.]

Whereas, it is alleged in the petition of —, widow of —, deceased, filed in this court, that the will of said —, now deceased, is in the possession of one —, and the court being satisfied that the allegation is correct by the oath of — (or by the affidavit of — filed with said petition), therefore, it is ordered that the said — produce the said will on the — day of —, A. D. 18—, at ten o'clock, A. M., of said day, and file the same in this court; and it is further ordered that a copy hereof be served upon said — at least three days before said time.

Dated —.

—, Judge of the — Court.

Form No. 6.—Warrant of Commitment upon Failure to Produce Will.

[Title of Court and Estate.]

Whereas, on the — day of —, A. D. 18—, a petition was filed herein by —, the widow of —, deceased, in which it

was alleged that —, a brother of said deceased, had in his possession the will of said deceased; and whereas, this court was satisfied by the oath of — (or by the affidavit of — filed with said petition) that such allegation was true, and thereupon made and entered the following order, to wit (here insert copy of order); that said order was duly served as therein directed; and whereas, at the time mentioned in said order the said — failed to obey said order, and thence hitherto has failed and refused, and now refuses, to obey said order; and whereas, it appears, from the evidence of —, that said will is in the possession of said —, he is therefore adjudged guilty of contempt of court in refusing to obey said order; it is further adjudged that said — be committed to the county jail of the county of —, state of —, there to be confined until he obeys the said order of this court.

Dated —.

—, Judge of the Superior Court.

§ 8. [1303.] Notice of Petition for Probate, how Given. — When the petition is filed and the will produced, the clerk of the court must set the petition for hearing by the court upon some day not less than ten nor more than thirty days from the production of the will. Notice of the hearing shall be given by such clerk by publishing the same in a newspaper of the county; if there is none, then by three written or printed notices posted at three of the most public places in the county. If the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication; and if in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and the last day being included. If the notice is by posting, it must be given at least ten days before the hearing. [Amendment approved March 3, 1881.]

Arizona. — Same, except that the probate judge must fix the day for hearing petition. Rev. Stats., sec. 973.

Idaho. — Same as Arizona. Rev. Stats., sec. 5301.

Montana. — Same as Arizona. Comp. Stats., p. 278, sec. 13.

Nevada. — “When any will shall have come into the possession of the probate court, and a petition for the probate thereof, and for the issuance of let-

ters testamentary, or letters of administration with the will annexed, shall have been filed, the court, or judge, shall appoint a time for proving it, which shall not be less than ten nor more than thirty days, and shall cause notice to be given thereof by the clerk, by publication in some newspaper, if there is one printed in the county, if not, then by notices posted in three public places in the county." Gen. Stats., sec. 2679.

Notices and Objections. — An act supplemental to an act entitled "An act to regulate the settlement of the estates of deceased persons," approved November 29, 1861. [Approved February 1, 1887.] Stats. 1887, p. 31.

SEC. 1. All notices required to be given by the act entitled "An act to regulate the settlement of the estates of the deceased persons," approved November twenty-ninth, eighteen hundred and sixty-one, may hereafter be given by the county clerk without an order from the judge for the same; and when so given for the time and in the manner required by law, they shall be as legal and valid as though made upon an order from such judge.

SEC. 2. If the court is not in session at the time set for the hearing of any matter concerning the settlement of the estate of deceased persons, any one opposing the application therein made may file objections thereto with the clerk, and thereafter the matter shall be heard upon the first day when the court is in session, unless such hearing is continued to some future day.

Utah. — Same as California.

"Any probate court of this territory is hereby authorized to grant orders admitting wills to probate, orders settling and allowing annual and final accounts of executors or administrators, and orders of distribution and partition of estates of decedents, without giving any notice of the hearing thereof by publication, or otherwise, than as herein provided, whenever it shall appear on the hearing of the application for such order that all the heirs, devisees, and legatees, or their legal representatives, and all parties who appear from the records or files of the court to have any interest in said estate, shall consent thereto in writing, signed by each of them, and verified by one or more of the signers; *provided*, that notice of the hearing of the application for such order shall be given by the clerk of said court by filing the same in writing in the office of said clerk, and by posting a copy thereof for a period of ten days prior to said hearing in some conspicuous place at the court-house where said court is usually held." Stats. 1890, p. 109, sec. 1.

"The notice provided for in the preceding section in the cases and under the conditions therein named shall be sufficient in all such cases, unless the probate judge shall otherwise order, in which case said notice shall be given as provided by law." Stats. 1890, p. 109, sec. 2.

"All laws in conflict with this act are hereby repealed." Stats. 1890, p. 109, sec. 3.

Washington. — "Any person named as an executor in a will, not having the same in his possession, may petition the court of proper jurisdiction for an order to have the same produced, that it may be admitted to probate, and that letters testamentary may be issued to him." Code Proc., sec. 858.

"Any person having an interest in the will may, in like manner, present a petition praying that it may be required to be produced and admitted to probate." Code Proc., sec. 859.

"The said court may compel, by citation and attachment, any person in whose possession any will may be, to produce it in court at such time as the court may order." Code Proc., sec. 860.

Wyoming. — Same as California, except that after the words "by the court," in the first sentence, these words are inserted, "or the judge or commissioner thereof in vacation or recess"; and the words "ten," in the last two sentences, are changed to "twenty." Laws 1890-91, p. 246, sec. 8.

Court may reduce the number of publications: *In re Cunningham*, 73 Cal. 558. made according to law: *McCrea v. Haraszthy*, 51 Cal. 146.

Order of publication need not direct how often the notice of hearing petition for probate of will shall be published, if it requires publication to be When notice is defective, the court should, of its own motion, vacate all proceedings under it: *In re Cameto*, Myr. Prob. 75.

Publication of Notice. — See § 315, *post*.

Form No. 7. — Notice of Hearing of Petition for Probate of Will.

[Title of Court and Estate.]

Notice is hereby given that —, the — day of —, 18—, at ten o'clock, A. M., of said day, and the court-room of said court, at the court-house in the city of —, county of —, and — of —, have been appointed as the time and place for proving the will of said —, deceased, and for hearing the application of — for the issuance to — of letters testamentary thereon.

Witness my hand and the seal of said court this — day of —, 18—.

—, Clerk.

By —, Deputy Clerk.

Form No. 8. — Order Appointing Time for Hearing Petition for Probate of Will.

[Title of Court and Estate.]

On reading and filing the petition of —, praying for the probate of a document purporting to be the last will and testament of —, deceased, which said will has been filed with said petition, —

It is ordered that —, the — day of —, A. D. 18—, be and the same is hereby appointed as the time for hearing said

petition and proving said will; and the clerk of this court is hereby directed to give due and legal notice thereof.

Dated —.

—, Judge.

NOTE. — This form is not needed, but may be used in California and Utah.

Form No. 9. — Affidavit of Posting of Notice of Probate of Will by Clerk to be Attached to Copy of Notice.

State of —, }
— County. } ss.

—, deputy county clerk of the — county aforesaid, being duly sworn, says that on the — day of —, 18—, he posted three notices, of which the annexed is a copy, in three of the most public places in said county, one of which was the place at which the court is held (here state the location of the other two places). —.

Subscribed and sworn to before me this — day of —,
A. D. 18—. —, County Clerk.

Form No. 10. — Affidavit of Publication of Notice of Hearing of Probate of Will to be Attached to a Copy of Said Notice.

State of —, }
— County. } ss.

—, being first duly sworn, on oath deposes and says that he is the printer (foreman or principal clerk) of the Daily Record-Union, a newspaper of general circulation published in said county; that a notice, a copy of which is annexed hereto, was published in said newspaper continuously from the — day of —, A. D. 18—, to the — day of —, A. D. 18—, both days inclusive.

Subscribed and sworn to before me this — day of —,
A. D. 18—. —, Notary Public.

§ 9. [1304.] **Notification.** — Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator resident in the state, at their places of residence, if known to the petitioner, and deposited in the post-

office, with the postage thereon prepaid, at least ten days before the hearing. If their places of residence be not known, the copies of notice may be addressed to them, and deposited in the post-office at the county seat of the county where the proceedings are pending. A copy of the same notice must in like manner be mailed to the person named as executor, if he be not the petitioner, also to any person named as co-executor not petitioning, if their places of residence be known. Proof of mailing the copies of the notice must be made at the hearing. Personal service of copies of the notice at least ten days before the day of hearing is equivalent to mailing. [Amendment approved March 24, 1874; took effect July 1, 1874.]

Arizona. — Same. Rev. Stats., sec. 974

Idaho. — Same. Rev. Stats., sec. 5302.

Montana. — Same. Comp. Stats., p. 279, sec. 14.

Nevada. — "If the heirs of the testator reside in the county, the court shall also direct citations to be issued and served upon them to appear and contest the probate of the will at the time appointed." Gen. Stats., sec. 2680.

"If the will is presented by any other person than the one named as executor, or if it is presented by one of several persons named as executors in the will, citations shall also be issued and served upon such person or persons if resident within the county." Gen. Stats., sec. 2681.

The court shall also direct subpoenas to be issued to the subscribing witnesses to the will, if they reside in the county.

Utah. — Same as California. Comp. Laws, sec. 3996.

Washington. — "Whenever personal notice is required to be given to any party to a proceeding in matters of probate, and no other mode of giving notice is prescribed, it shall be given by citation issued from the court, signed by the clerk, and, under the seal of the court, directed to the sheriff of the proper county, requiring him to cite such person to appear before the court or judge, as the case may be, at a time and place to be named in such citation. In the body of the citation shall be briefly stated the nature or character of the proceedings." Code Proc., sec. 848.

"In all cases in which citations are issued from the superior court in probate proceedings, they shall be served at least ten days before the term at which they are made returnable, except when issued from the court in cases where the law requires the judge to issue them upon his own motion, and he does so issue them; and in such cases they shall be served in sufficient time to allow the person served to be in attendance on the court." Code Proc., sec. 850.

Wyoming. — Same as California, § 9, *supra*. Laws 1890-91, p. 247, sec. 9.

Citation. — See §§ 317-321, *post*.

Jurisdiction is not acquired by as required by above section: *Randolph*
the court, unless notice is given strictly *v. Bayue*, 44 Cal. 370.

Form No. 11. — Proof of Service by Mail of Notice of the Hearing of Petition for Probate of Will.

[Title of Court and Estate.]

State of —, }
 — County. } ss.

—, being duly sworn, says that on the — day of —, A. D. 18—, he served the notice of the time appointed for the hearing of the petition for the probate of the will of the above-named decedent upon —, —, —, —, —, and —, the persons named in said notice, by depositing in the United States post-office at —, —, county of —, state of —, with the postage thereon prepaid, and addressed to each of said persons respectively, copies of said notice, the original of which is hereto annexed.

Subscribed and sworn to before me this — day of —, A. D. 18—. —, Notary Public.

Form No. 12. — Proof of Personal Service of Notice or Citation.

(Follow preceding form to and including "in said notice, by"; then as follows: delivering personally to each of them at the county of —, state of —, a copy of said notice, the original of which is hereto attached.)

Subscribed and sworn to before me this — day of —, A. D. 18—. —, Notary Public.

§ 10. [1305.] **Petition may be Presented to Judge at Chambers, and What Judge may do.**—A judge of the superior court may at any time make and issue all necessary orders and writs, to enforce the production of wills and the attendance of witnesses. [Stats. 1891, p. 427.]

Arizona. — Same as California; and it is also provided that applications for the probate of a will and for the issuance of letters may be made to the probate judge, out of term time or at chambers. He may also appoint a special term for the hearing of such application." Rev. Stats., sec. 975.

Idaho. — Same as Arizona. Rev. Stats., sec. 5303.

Montana. — Same as Arizona. Comp. Stats., p. 279, sec. 15.

"The clerks of the several district courts of the state shall have power, in vacation, to file petitions for probate of wills and of administration and guardianship issue notices of hearing of the same, and, upon such hearing,

grant letters testamentary, of administration, and of guardianship, where no protests or objections are made or filed thereto; appoint appraisers of property of decedents; file and approve all bonds of executors, administrators, and guardians; file all reports, accounts, and petitions of executors, administrators, and guardians; file and approve claims against estates; file and approve all accounts of executors, administrators, and guardians (except final accounts); issue all orders of hearings and orders to give notice to creditors; and generally to make such orders as may be necessary to the exercise of the powers hereby conferred." Laws 1891, p. 219, sec. 1.

"Any act of the clerks, as contemplated in section one of this act, shall be binding on all parties interested therein until the next term of the court after they are entered of record, when they shall be read in open court, and approved, set aside, or modified; but until so set aside or modified, it shall have the same force and effect as if done by the court." Laws 1891, p. 219, sec. 2.

"Nothing in this act shall be so construed as to in any way abridge the power or duties already conferred upon clerks of the district court." Laws 1891, p. 220, sec. 3.

Utah. — Same as Arizona, except that clerk may also receive petitions. Comp. Laws, sec. 3997.

Washington. — Same as California. Code Proc., sec. 861, under § 7, *ante*.

Wyoming. — Same as California. Commissioner may also act in same manner in vacation. Laws 1890-91, p. 247, sec. 10.

§ 11. [1306.] Hearing. — At the time appointed for the hearing, or the time to which the hearing may have been postponed, the court, unless the parties appear, must require proof that the notice has been given, which being made, the court must hear testimony in proof of the will. [Amendment approved March 24, 1874; took effect July 1, 1874.]

Arizona. — Same. Rev. Stats., sec. 976.

Idaho. — "At the time appointed for, or to which the hearing may have been postponed, the court must require proof, by affidavit, that the notices hereinbefore required have been personally served, or mailed and published, which being made, the court must hear testimony in proof of the will. If such notice is not proved to have been given, or if from any other cause it is necessary, the hearing may be postponed to a day certain, and notice to absentees given thereof as original notice is required to be given. The appearance in court of parties interested is a waiver of notice." Rev. Stats., sec. 5304.

Montana. — Same as California. Comp. Stats., p. 279, sec. 16.

Nevada. — Same as California, except that "unless the parties appear" is omitted. Gen. Stats., sec. 2683.

Utah. — Same as California. Comp. Laws, sec. 3998.

Wyoming. — Same as California. Judge or commissioner may act in vacation. Laws 1890-91, p. 247, sec. 11.

Before admitting will to probate the court must require proof of all acts requisite to constitute an execution of a valid will; but such proof need not be submitted to the jury or passed upon by them. They are only to pass upon contested points. The judgment admitting the will to probate is sufficiently supported by the finding of the court recited therein, that the will was executed in all respects according to law: *In re Cartery*, 56 Cal. 470.

Courts of probate have exclusive jurisdiction of matters relating to the proof of wills: *Castro v. Richardson*, 18 Cal. 479.

Courts of chancery have no power to determine the validity of a will: *State v. McGlynn*, 20 Cal. 266.

A will being once admitted to probate must be recognized as valid in all courts so long as the probate stands: *State v. McGlynn*, 20 Cal. 273.

It is only an irregularity if the court does not admit a will to probate on the day specified in the notice, and fails to fix a day for hearing the matter in an order continuing it; but such irregularity does not oust the court of its jurisdiction: *In re Warfield*, 22 Cal. 51.

Recitals in decree showing due notice, when the affidavits on file are defective, may be attacked on the ground that the record shows the recitals to be untrue, and that the court was imposed upon: *In re Rice*, Myr. Prob. 183.

An order admitting a will to probate and appointing an administrator with the will annexed is void unless the notice is given and proven as required by law: *In re Charlebois*, 6 Mont. 373.

Jurisdiction in Probate: See § 1, *ante*.

§ 12. [1307.] Who may Appear and Contest the Will. — Any person interested may appear and contest the will. Devisees, legatees, or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the court for that purpose; but a contest made by an attorney appointed by the court does not bar a contest after probate by the party so represented, if commenced within the time provided in Article IV. of this chapter; nor does the non-appointment of an attorney by the court of itself invalidate the probate of a will. [Amendment approved March 24, 1874; took effect July 1, 1874.]

See § 25, *post*, for time to contest will.

Arizona. — Same. Rev. Stats., sec. 977.

Idaho. — Same, except that creditors may contest. Rev. Stats., sec. 5305.

Montana. — Same as California. Comp. Stats., p. 279, sec. 17.

Nevada. — Provides only that any person interested may contest, and that minors and non-residents may be represented by an attorney appointed by the court. Gen. Stats., sec. 2684.

Utah. — Same as California. Comp. Laws, sec. 3999.

Wyoming. — Same as California, except that all is omitted from the words "for that purpose" to the words "the non-appointment of an attorney"; also, a commissioner may act. Laws 1890-91, p. 248, sec. 1.

The taking of a legacy by the wife under the will of the husband will not prevent her from contesting the validity of the will, so far as it

disposes of her one-half interest in the common property to others: *Beard v. Knox*, 5 Cal. 252.

Guardian ad litem. — Section

372 of Cal. Code Civ. Proc., concerning the appointment of guardians *ad litem* to represent infants, does not apply to probate proceedings: *Carpenter v. Superior Court*, 75 Cal. 596.

Attorney for minor need not

be reappointed after demurrer to a petition and an amendment of the petition. A new guardian *ad litem* is not necessary every time a pleading is amended: *Carpenter v. Superior Court*, 75 Cal. 596.

§ 13. [1308.] Probate when No Contest. — If no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

Arizona. — Same. Rev. Stats., sec. 978.

Idaho. — Same. Rev. Stats., sec. 5306.

Montana. — Same. Comp. Stats., p. 280, sec. 18.

Nevada. — Same. Gen. Stats., sec. 2685.

Utah. — Same. Comp. Laws, sec. 4000.

Wyoming. — Same. Court, judge, or commissioner may act. Laws 1890-91, p. 247, sec. 12.

An order admitting a will to probate, there being no contest, is not conclusive as against minor heirs. A decree annulling it upon application of one minor acts upon the interest of the applicant only: *Sampson v. Sampson*, 64 Cal. 327.

Probate, admission to, effect of: Cal. Code Civ. Proc., sec. 1908.

Where an antenuptial will is shown to have been revoked by

marriage, and no marriage contract is proven, the power of the court is limited to denying probate to the will, and determining who has a right to administer upon the estate. It has no jurisdiction to inquire into any facts affecting the consideration, validity, or operation of a deed of separation between the testator and wife: *Corker v. Corker*, 87 Cal. 645.

§ 14. [1309.] Olographic Wills. — An olographic will may be proved in the same manner that other private writings are proved.

Arizona. — Same. Rev. Stats., sec. 979.

Idaho. — Same. Rev. Stats., sec. 5307.

Montana. — Same. Comp. Stats., p. 280, sec. 19.

Utah. — Same. Comp. Laws, sec. 4001.

Wyoming. — Same. Laws 1890-91, p. 247, sec. 13.

Letter referred to in olographic will, but not in existence when will was executed, and which was, after execution of will, dictated and signed, but not written, by testator, is not a

part of such will, and should not be admitted to probate as such: *In re Shillaber*, 74 Cal. 144.

Writings, execution, proof of: Cal. Code Civ. Proc., sec. 1940.

ARTICLE II.

CONTESTING PROBATE OF WILLS.

- § 15. Contestant to file grounds of contest, and petitioner to reply.
- § 16. How jury obtained and trial had.
- § 17. Verdict of the jury — Judgment.
- § 18. Witnesses, who and how many to be examined — Proof of handwriting admitted when.
- § 19. Testimony reduced to writing for future evidence.
- § 20. If proved, certificate to be attached.
- § 21. Will and proof to be filed and recorded.

§ 15. [1312.] Contestant to File Grounds of Contest, and Petitioner to Reply.—If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer provided for in Part II., Title VI., Chapter III., of this code. If the demurrer is sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving, —

1. The competency of the decedent to make a last will and testament;

2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence;

3. The due execution and attestation of the will by the decedent or subscribing witnesses; or

4. Any other questions substantially affecting the validity of the will;

— Must, on request of either party in writing (filed three days prior to the day set for the hearing), be tried by a jury. If no jury is demanded, the court must try and determine the issues joined. On the trial, the contestant is plaintiff, and the petitioner is defendant.

For Part II., Title VI., Chapter III., see Cal. Code Civ. Proc., secs. 430 et seq.

Arizona. — Same. Rev. Stats., sec. 980.

Idaho. — Same. Rev. Stats., sec. 5308.

Montana. — Same. Comp. Stats., p. 280, sec. 20.

Nevada. — "If any person appears and contests a will, he shall file a statement in writing of the grounds of his opposition; when any issue or issues of fact shall be joined in the probate court, respecting the execution by the deceased of such last will and testament, under restraint or undue influence, or fraudulent representations, or for any other cause affecting the validity of such will, the court shall proceed to try such issue or issues of fact, and shall be governed by the same rules as are provided by law for the trial of issues of fact in the district courts of the state; *provided, however*, that the court shall, upon the demand of either party to said contest, submit said issue or issues of fact to a jury." Stats. 1891, pp. 104, 105, sec. 1, amending Gen. Stats., sec. 2686.

Utah. — Same, to and including the word "objection," then as follows: "All issues, whether of law or fact, must be tried by the court, unless an issue of fact be referred as hereinafter provided." Comp. Laws, sec. 4002.

Wyoming. — Same as California, except that the second sentence is omitted and the word "or" is substituted for the words "if the demurrer is overruled," in the third sentence; the last five lines are omitted, and in place thereof the following is inserted: "Then all pending matters relating thereto must be suspended until the next term of the court [district] held in that county, or at the same term under the direction of the court, and the case entered regularly for trial on the trial docket thereof, and the issues joined must be tried and determined by the court." Laws 1890-91, p. 248, sec. 1.

Where the instrument offered is evidently of a testamentary character, the inquiry is only as to mental condition of testator; whether he has acted under duress, menace, fraud, or undue influence; whether the will was duly executed, etc.: *In re Cobb*, 49 Cal. 604.

Parol testimony will be received to show whether an instrument propounded as a will is such when upon its face it is not testamentary in its character. If it appears from the surrounding circumstances that the instrument was intended to be a will, the court will give effect to the intention: *Clarke v. Ransom*, 50 Cal. 595.

Where, at the time of executing the will, the testator expressly directed that the names of certain of

his children should be omitted therefrom, such declarations of the testator are a part of the *res gestæ*, and may be given in evidence: *Nelson v. McClanahan*, 55 Cal. 308.

The testator, soon after the execution of the will, told the proponent that he would some day tell him what he wished to have him do with some of his property; and before his death directed him to pay certain persons and charitable institutions certain sums. *Held*, that while in a proper case the courts would compel a devisee to carry out such directions, the fact of such directions having been given and assented to was not evidence that the execution of the will was procured by undue influence: *In re Brooks*, 54 Cal. 471.

Presumption of undue influ-

ence will not *per se* be raised from the fact that the devisee, under a will, was a partner of the testator at the time of the latter's death, and for many years prior thereto: *In re Brooks*, 54 Cal. 471.

Undue influence will not be presumed by the fact that the beneficiary drew the will: *In re Byrne*, Myr. Prob. 1.

Undue influence of wife to the exclusion of son: *In re Low*, Myr. Prob. 143.

If the probating of a will is contested on the ground that its execution was obtained by undue influence, evidence that the testator was intoxicated when the will was executed is admissible in connection with other circumstances, and if such testimony is introduced, the court cannot take from the jury the right to find on the issue: *In re Cunningham*, 52 Cal. 465.

No presumption arises that a man is of unsound mind from the fact that he is a drunkard: *In re Lang*, 65 Cal. 19; *In re Johnson*, 57 Cal. 529.

Habitual intemperance, incapacity from.—Charge to jury on contest of will: *In re Black*, Myr. Prob. 24.

Mental incapacity arising from alcoholism: *In re Hannigan*, Myr. Prob. 135.

The person alleging unsoundness of mind in a testator must prove it: *Panaud v. Jones*, 1 Cal. 498.

Hearsay evidence is inadmissible upon an issue of insanity of testator: *Sexton v. Sexton*, 56 Cal. 426.

Where an insane testator tears his name from a will, there is no intent to revoke: *In re Lang*, 65 Cal. 19.

Upon an issue as to the mental condition of a testator, the opinions of persons acquainted with his business and social habits held to be admissible in evidence: *In re Brooks*, 54 Cal. 471.

When insanity of testator is alleged, and the disease causing his insanity was a progressive one, a witness may testify as to the condition of testator's mind at a time prior to the execution of the will: *In re Dalrymple*, 67 Cal. 444.

The jury, in passing upon the mental condition of a testator, should not consider family differences, except as they bear upon the testator's mental

capacity at the time of the execution of the will: *In re Lang*, 65 Cal. 19.

Declarations of a person of unsound mind that he was of unsound mind, etc., at the time of the execution of a will does not tend to prove the truth of the matters declared by him: *In re Lang*, 65 Cal. 19.

In a contested will case the contestants are the plaintiffs, and the petitioners for probate are the defendants: *In re Wooten*, 56 Cal. 325; *In re Dalrymple*, 67 Cal. 444.

Sections 1312 and 1308 of the Code of Civil Procedure (secs. 13 and 15, *ante*) apply only to proceedings in contests against the probate of wills in which the contestant is plaintiff and the petitioner is defendant, and do not apply to application for letters of administration. In the latter case, the grounds of opposition to the petition which are filed by the administrator are nothing more than an answer, to which no replication is required: *In re Wooten*, 56 Cal. 323.

Allegations in a contest of a will are not sufficient to raise an issue as to its attestation, where they show only that when testator signed such will he was misled and deceived, and was under the undue influence of proponent: *In re Burrell*, 77 Cal. 479.

It is sufficient to allege "that the deceased at the time of making the will was not of sound and disposing mind": *In re Gharkey*, 57 Cal. 274.

In contesting a will, when the grounds embrace conclusions of law, as menace, duress, and the like, the facts relied on must be stated: *In re Gharkey*, 57 Cal. 274.

When unsoundness of mind is relied on to defeat a will, drunkenness should not be submitted to the jury as a special issue: *In re Gharkey*, 57 Cal. 274.

All questions relating to amendments of pleadings should be passed upon when presented, and before proceeding further with the trial: *In re Brooks*, 54 Cal. 473.

The construction of a devise is always a matter of law, and should never be submitted to a jury: *Bruck v. Tucker*, 42 Cal. 355.

Where a contest of the will did not set up an objection to the will, it is proper to omit from the findings a finding on such a point, as upon it

there were no issues to try: *In re Cartery*, 56 Cal. 470.

Where on an appeal from an order admitting a will to probate it appears that the only written ground of opposition to the probate taken by appellant was the incompetency of the deceased to make a will, questions relating to the due execution and attestation of the will will not be considered: *In re Kile*, 72 Cal. 131.

On the contest of a will, where the tribunal found against the contestants on all the issues raised by them, the fact that it also found upon an issue not embraced in the pleadings of the contest, and in such case no finding declaring the will valid as olographic was necessary to sustain the validity of the probate of the will: *In re Learned*, 70 Cal. 142.

Where no point is made at the trial as to an error, and there is no specification of error upon the point, the error cannot be taken advantage of in the supreme court for the first time in contesting a will: *In re McCarty*, 58 Cal. 335.

In a contest of a will, where the contestant's allegations are not denied, no default can be entered. The proponent makes his proof, and then contestant proceeds to establish his grounds of contest. If he fails in this, the will is to be admitted to probate: *In re Doyle*, 73 Cal. 564.

On contest of a will on the ground of undue influence, a stipulation between counsel that "the foregoing questions shall be and are the issues of the contest in the matter of the estate of E. C., deceased," was filed, and under it there was submitted to the jury the following question: "Did the said E. C., at the time of signing the instrument offered for probate, sign or execute the same under undue influence of J. H. N., or of A. N., or of any other person?" To which the jury responded Yes. It was held that the verdict was sufficient to warrant a judgment setting aside the will: *In re Cahill*, 74 Cal. 52.

Failure to appoint a guardian *ad litem*, where a minor is contesting a will, until the day of trial of the contest will not affect the jurisdiction of the court, and is not good ground for setting aside a verdict: *In re Cahill*, 74 Cal. 52. See *In re Crittenden*, Myr.

Prob. 50; *In re Black*, Myr. Prob. 24; *In re Collins*, Myr. Prob. 73; *In re Tittel*, Myr. Prob. 12.

Demurrer is a proper pleading in the probate court: *Leggett v. Meyers*, 1 Idaho, 548.

The public administrator has no vested rights in an escheated estate, and cannot be heard to urge the unconstitutionality of an act validating a will which has been informally executed: *In re Sticknoth*, 7 Nev. 223.

In a contest of a will, etc., the petition was demurred to on the ground that the court had no jurisdiction; it was held that the demurrer should be overruled: *Clark v. Ellis*, 9 Or. 128.

A person is generally held to be of sound mind, and to have testamentary capacity, if he understands the business in which he is engaged at the time, the objects of his bounty, the state of his property, and, in fact, has faculties sufficient to enable him to dispose of his property according to his own will and desire: *Hubbard v. Hubbard*, 7 Or. 42.

Testamentary capacity is mainly a question of fact, to be determined from a consideration of all the evidence: *Chrisman v. Chrisman*, 16 Or. 127.

The testator must have sufficient capacity to comprehend the conditions of his property, his relation to the persons who were, should, or might have been the objects of his bounty, and the scope and bearings of the provisions of his will: *Chrisman v. Chrisman*, 16 Or. 127.

In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of bodily health, that is to be attended to. The latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of: *Chrisman v. Chrisman*, 16 Or. 127.

When a will is shown to have been duly executed, there arises a presumption of sanity in favor of the testator, which, at this stage of the proceedings, unless rebutted or overcome by counter-evidence, will be sufficient to authorize the probate of the will: *Chrisman v. Chrisman*, 16 Or. 127.

When in a civil proceeding the

question of sanity and insanity is directly in issue, while giving to the general presumption in favor of sanity all that may fairly be claimed for it, the burden of proving sanity is upon the party who asserts it: *Chrisman v. Chrisman*, 16 Or. 127.

Will cannot be set aside on account of a delusion not connected with the matters mentioned in such will: *Potter v. Jones*, 20 Or. 239.

Delusions are conceptions that originate spontaneously in the mind, without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis: *Potter v. Jones*, 20 Or. 239.

At trial of contest of will, which is determined upon an issue as to the testamentary capacity of the deceased, it is not error to admit the opinion of a witness as to the mental sanity of the deceased, where there is considerable evidence to the point of his intimacy, although the showing of intimacy may not be very strong. The determination of the question of intimacy, where such evidence is admitted, is in the discretion of the court. But there is a distinction between the admission and the rejection of such evidence; and it is error for the court to refuse to allow the opinion of the witness as to the mental sanity of the deceased to be given, when the showing of intimacy is sufficient: *In re Carpenter*, 79 Cal. 382.

It is error upon trial of a contest of will to refuse to allow the witness to testify whether or not there had been any change in the mental condition or capacity of the deceased, provided the witness was asked for facts about the change, and

not for a conclusion. A marked change in a man's habits of thought is strong evidence of mental unsoundness, and the absence of such change is evidence of the contrary: *In re Carpenter*, 79 Cal. 382.

Upon the trial of issue as to mental competency of a testator it is for the jury to say whether the will of a bachelor giving his property to the children of his business partner, instead of to his brothers and their children in the Eastern states, was unnatural; and an instruction characterizing such will as unnatural is improper and prejudicial: *In re Carpenter*, 79 Cal. 382.

Undue influence is provided for in section 1575 of the California Civil Code generally, and this section is applicable to wills as well as to contracts. The same is true of the provisions of section 1572 of the same code relative to fraud: *In re Kohler*, 79 Cal. 313.

An allegation by the contestant of a will that the mind of the decedent was weak, debilitated, and deranged to such an extent as to incapacitate him from making or undertaking a will or codicil, tenders an issue as to "the competency of the decedent to make a last will and testament": *In re Kohler*, 79 Cal. 313.

Declarations of a testator made to his executor just before his death, and more than five years after the date of the will, as to what was intended by the will, and who wrote it, constitute no part of the *res gestæ*, and are not admissible in evidence: *In re Gilmore*, 81 Cal. 240.

Service of papers, etc.: See secs. 1010-1017 Cal. Code Civ. Proc.

Practice: See § 323, *post*.

Form No. 13. — Opposition to Probate of Will.

[Title of Court and Estate.]

And now comes — and opposes the admission to probate of the will of the above-named decedent now presented to this court, and for cause thereof alleges: —

1. That he is a devisee (legatee or heir) of the estate of said decedent, and interested in the estate left by him;
2. That the said document now offered for probate is not the last will and testament of said decedent;

3. That at the time of signing said document said decedent was not of sound mind;

4. That said document was not signed by said deceased, nor by any person in his presence nor by his direction;

5. That said document was not attested by at least two competent witnesses subscribing their names thereto, in the presence of the said decedent and at his request, nor did said decedent declare to said witnesses that he published said document as his last will and testament;

6. That at the time said document is alleged to have been signed by decedent, said decedent was under the age of eighteen years (or was under restraint, undue influence, and fraudulent misrepresentations in this (state in what respect); —

Wherefore, the said — prays that said document be not admitted to probate, but that this court will refuse to admit said document to probate as the last will and testament of decedent.

——. Contestant.

——, Attorney for Contestant.

Form No. 14. — Petition for Letters of Administration and Opposition to Probate of Will.

[Caption, Form No. 1, § 5, *ante*.]

1. That — died intestate, in said county of —, being a resident thereof, on the — day of —, A. D. 18—;

2. That she left estate therein, consisting of real and personal property, an accurate description of which your petitioner is unable to give, of the probable value of twelve thousand dollars;

3. That her heirs, so far as known to your petitioner, are a sister, residing at —, Central America, by name —;

4. That your petitioner is the public administrator of said county of —, and, as such, entitled to letters of administration upon the estate of said decedent, and prays that the same be issued to him.

And petitioner further shows to the court, and in opposition to the petition for a probate of a document filed in this court on the — day of —, A. D. 18—, alleged to be the last will and testament of the said deceased, he avers: —

1. That such document is not the will of said deceased;
 2. That the same is not signed by her, or by any one authorized by her to sign the same for her;
 3. That at the time the said alleged will purports to have been signed, the said decedent was not of sound or disposing mind or memory, and had no power to make a will; (or
 4. That at the time the same purports to have been signed, the said decedent was dead.) —, Petitioner.
- , Attorney for Petitioner.

Form No. 15.—Demurrer to Contest of Will.

[Title of Court and Estate.]

—, the petitioner for the probate of the last will and testament of —, and for the issuance to him of letters testamentary thereon, for demurrer to the contest of —, public administrator, filed herein, contesting the probate of said will, alleges: —

1. That the said contestant has not legal capacity to contest the probate of said will, for the reason that he is not a "person interested" in said estate, or in the above-entitled matter; and he is not one of the persons entitled or authorized to contest the probate of said will; that he is neither a devisee, legatee, or heir of said estate, or otherwise interested therein;

2. That the said opposition or contest of said —, filed herein, does not state facts sufficient to constitute a ground of opposition to said will; —

Wherefore, proponent prays that said opposition or contest be dismissed.

—, Attorney for Proponent.

Form No. 16.—Answer to Contest of Will.

[Title of Court and Estate.]

Now comes —, proponent of the will of said deceased, and, for answer to the contest or opposition to the probate of said will filed herein by —, denies and avers as follows: —

1. Denies that said — is the only surviving brother of said deceased, or is a brother of said deceased; denies that said — is interested in the estate of said deceased, or is one of the heirs at law of said deceased; denies that the docu-

ment now offered for probate in this court as the last will and testament is not her last will and testament, or her will and testament, but avers the same to be the last will and testament of said deceased;

2. Denies that at the time of signing said will or document the said — was not of sound and disposing mind, or either thereof, and denies the said deceased was not competent to make her last will and testament, or will or testament, but avers that at the time of signing said document said deceased was of sound and disposing mind, and was competent to make her last will and testament;

3. Denies that said will or document was not signed by said —; denies that said will or document was not signed by any person in the presence of said deceased, or by her express direction, or either thereof;

4. Denies that said will or document was not attested by two competent witnesses subscribing their names thereto at the request of said —, and in her presence, and in the presence of each other;

5. Denies that at the time of the signing of the said will or document the said — signed the same under duress or menace, or undue influence, or fraud of any person, or either or any thereof, but avers that at the time said document was signed said — was not acting under and did not sign the same under duress, menace, undue influence, and fraud of any person, or either thereof;—

Wherefore, proponent prays that said contest or opposition may be dismissed, and that said will or document may be admitted to probate as the last will and testament of said deceased, and for costs herein.

—, Attorney for Proponent.

Form No. 17.—Demand for Jury to Try Issues of Contest of Will.

[Title of Court and Estate.]

The undersigned, one of the heirs at law of —, deceased, hereby demands that the issues herein, arising upon the petition of —, contesting the probate of the last will and test

ment of said —, deceased, and the answer to said petition, be tried by a jury.

Dated —, 18—.

—, Attorney for said —.

§ 16. [1313.] **Jury Trial.** — When a jury is demanded, the superior court must impanel a jury to try the case, in the manner provided for impaneling trial juries in courts of record, and the trial must be conducted in accordance with the provisions of Part II., Title VIII., Chapter IV., of this code. A trial by the court must be conducted as provided in Part II., Title VIII., Chapter V., of this code. [Amendment approved April 16, 1880; took effect immediately.]

For Part II., Title VIII., Chapters IV. and V., see Cal. Code Civ. Proc., secs. 600-636.

Arizona. — Same. Rev. Stats., sec. 981.

Idaho. — Same, except the last sentence is omitted. Rev. Stats., sec. 5309.

Montana. Same. Comp. Stats., p. 280, sec. 21.

Nevada. Under last section no jury trial allowed. Gen. Stats., sec. 2686.

A probate court may change the place of trial if an impartial trial cannot be had. A transcript of the proceedings and the result of the trial can be certified by the court where the trial took place, to the other court, on receiving which the latter can enter judgment with proper recitals: *People v. Almy*, 46 Cal. 246.

Will. — Charge to jury on undue influence: *In re Low*, Myr. Prob. 143.

Charge to jury on mental incapacity

caused by alcoholism: *In re Black*, Myr. Prob. 24.

Opinion of expert on alcoholism: *In re O'Keefe*, Myr. Prob. 154.

Any error in trial of contest of will is presumed to work injury, and is sufficient ground for granting a new trial: *In re Crozier*, 74 Cal. 180.

Change of place of trial: See Cal. Code Civ. Proc., secs. 397, 398; also §§ 105 et seq., *post*.

§ 17. [1314.] **Verdict — Judgment.** — The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court, upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing. If the will is admitted to probate, the judgment, will, and proofs must be recorded.

Arizona. — Same. Rev. Stats., sec. 982.

Idaho. — Same. Rev. Stats., sec. 5310.

Montana. — Same. Comp. Stats., p. 281, sec. 22.

Nevada. — See Gen. Stats., sec. 2686, under § 15, *ante*.

Utah. — "At the hearing of the contest, the proofs of the subscribing witnesses must be reduced to writing, whereupon the judgment of the court

must be rendered, either admitting the will to probate or rejecting it. If the will is admitted to probate, the judgment, will, and proofs of the subscribing witnesses must be recorded." Comp. Laws, sec. 4003.

Wyoming. — "After hearing the case, the judgment of the court shall be rendered upon a special finding, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing, and filed with the papers in the case. If the will is admitted to probate, the judgment and will must be recorded." Laws 1890-91, p. 248, sec. 2.

When on the contest of a will the contestants neglect to submit issues to the jury, they waive their rights to do so, and it then becomes the duty of the court to find on such issues: *In re Dalrymple*, 67 Cal. 444.

An order in favor of the validity of a will will not be disturbed if the evidence is conflicting: *In re McCarty*, 58 Cal. 335.

The verdict of the jury is conclusive on the court: *In re Bowen*, 34 Cal. 687. See also last section.

The verdict of a jury is not too indefinite to warrant a judgment setting aside a will, if the jury answer simply "yes" to the following question: "Did the said C., at the time of signing the instrument offered for probate, sign or execute the same under undue influence of either J. H. N., or of A. N., or of any other person?" *In re Cahill*, 74 Cal. 52.

The court submitted two issues of fact to a jury, impaneled on its own motion for that purpose, which found on these issues, and was discharged. The court took no further action in the matter and the case was not decided. *Held*, that this was not the verdict of a jury within the meaning of section 659 of the Code of Civil Procedure, which provides that "the party intending to move for a new

trial must, within ten days after the verdict of the jury, . . . file with the clerk a notice of his intention," etc., but was merely advisory to the judge; and a notice of intention to move for a new trial, and the presentation of the statement for settlement, were premature: *James v. Superior Court*, 78 Cal. 107.

A formal judgment is unnecessary; a direct statement that the will is proved, although entered in the minutes as part of and preliminary to an order directing letters to issue, is sufficient: *In re Warfield*, 22 Cal. 52.

It is not ground for setting aside a verdict in case of a contest of a will by a minor that no guardian *ad litem* was appointed until the day of trial, no objection having been made on that ground: *In re Cahill*, 74 Cal. 52.

When, in proceedings to contest probate of will, special issues were tried by a jury, and the findings were insufficient to support a general verdict for contestants, the judgment entered on such verdict was properly set aside on motion, and an appeal on motion for a new trial was unnecessary: *In re Langan*, 74 Cal. 353.

Special Verdict: Cal. Code Civ. Proc., secs. 624-628.

Effect of Probate: Cal. Code Civ. Proc., sec. 1908.

Form No. 18. — Testimony of Subscribing Witness on Probate of Will.

[Title of Court and Estate.]

State of —, }
 — County. } ss.

—, a competent witness, being duly sworn in open court, testifies as follows:—

I reside in the county of —, state of —. I knew — on the

— day of —, 18—, the date of the instrument now shown to me, marked as filed in this court on the — day of — 18—, purporting to be the last will and testament of the said —. I am one of the subscribing witnesses to said instrument. I also knew at the said date of said instrument — the other — of said subscribing witnesses. The said instrument was signed by the said —, at —, in the county of —, on the said — day of —, 18—, the day it bears date, in the presence of myself and of said —; and the said — thereupon published the said instrument as and declared to us the same to be — last will and testament, and requested us in attestation thereof to sign the same as witnesses. The said — and I, then and there, in the presence of the said —, and in the presence of each other, subscribed our names as witnesses to the said instrument. At the time of executing the said instrument, to wit, the — day of —, 18—, the said — was over the age of eighteen years, to wit, of the age of — years, or thereabouts, and was of sound and disposing mind, and not acting under duress, menace, fraud, undue influence, or misrepresentation.

Subscribed and sworn to in open court before me —, this day of —, 18—. —, Clerk.

§ 18. [1315.] Witnesses.— If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of the execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them.

Arizona. — Same. Rev. Stats., sec. 983.

Idaho. — Same. Rev. Stats., sec. 5311.

Montana. — Same. Comp. Stats., sec. 23, p. 281.

Nevada. — Same. Gen. Stats., secs. 2687, 2688.

Utah. — Same. Comp. Laws, sec. 4004.

Washington. — "If any witness be prevented by sickness from attending at the time, when any will may be produced for probate, or reside out of the

state, or more than thirty miles from the place where the will is to be proven, such court may issue a commission annexed to such will, and directed to any judge, justice of the peace, or mayor, or other person, empowering him to take and certify the attestation of such witness." Code Proc., sec. 863.

"If such witness appear before such officer and make oath or affirmation that the testator signed the writing annexed to such commission as his last will, or that some other person signed it by his direction and in his presence, that he was of sound mind, that the witness subscribed his name thereto in the presence of the testator, the testimony so taken shall have the same force as if taken before the court." Code Proc., sec. 864.

"When one of the witnesses to such will shall be examined, and the other witnesses are dead, insane, or their residence unknown, then such proof shall be taken of the handwriting of the testator, and of the witnesses dead, insane, or residence unknown, and of such other circumstances as would be sufficient to prove such will." Code Proc., sec. 865.

"If it shall appear to the satisfaction of the court that all the subscribing witnesses are dead, insane, or their residence unknown, the court shall take and receive such proof of the handwriting of the testator and subscribing witnesses to the will, and of such other facts and circumstances as would be sufficient to prove such will." Code Proc., sec. 866.

Wyoming. — Same as California. Laws 1890-91, p. 249, sec. 3.

The presumption is in favor of the proceedings of the court; where the objection that all the subscribing witnesses were not produced as sought to be availed of, it must ap-

pear from the record that the witness not called was not within any of the exceptions mentioned in the above section as excusing his non-production: *In re McCarty*, 58 Cal. 335.

§ 19. [1316.] Testimony Reduced to Writing.—

The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this state.

Arizona. — Same. Rev. Stats., sec. 984.

Idaho. — Same. Rev. Stats., sec. 5312.

Montana. — Same. Comp. Stats., p. 281, sec. 24.

Nevada. — Same. Gen. Stats., sec. 2689.

Utah. — Same. Comp. Laws, sec. 4005.

Washington. — "All the testimony adduced in support of the will shall be reduced to writing, signed by the witnesses, and certified by the judge of the court." Code Proc., sec. 867.

"In all trials respecting the validity of a will, if any subscribing witness be deceased, or cannot be found, the oath of such witness, examined at the time of probate, may be admitted as evidence." Code Proc., sec. 875.

Wyoming. — Same as California, with these words added, "or is otherwise incompetent." Laws 1890-91, p. 249, sec. 4.

§ 20. [1317.] If Proved, Certificate to be Attached.—If the court is satisfied, upon the proof taken or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts found, signed by the judge and attested by the seal of the court, must be attached to the will.

Arizona.—Same. Rev. Stats., sec. 985.

Idaho.—Same. Rev. Stats., sec. 5313.

Montana.—Same. Comp. Stats., p. 281, sec. 25.

Nevada.—“If the court shall be satisfied, upon the proof taken, and from the facts found by it, or by the jury, that the will was duly executed, and that the testator, at the time of the execution, was of sound and disposing mind, and not under restraint, undue influence, or fraudulent misrepresentations, a certificate of the proof and the facts found, signed by the probate judge, and attested by the clerk, with the seal of the court, shall be attached to the will.” Gen. Stats., sec. 2690.

Utah.—Same as California, except that the following clauses are omitted: “Or from the facts found by the jury,” and also, “and the facts found.” Comp. Laws, sec. 4006.

Washington.—“When any will is exhibited to be proven, the court may immediately receive the proof and grant a certificate of probate, or if such will be rejected, issue a certificate of rejection.” Code Proc., sec. 862.

Wyoming.—Same as California, except that these words are omitted, viz., “or from the facts found by the jury.” Laws 1890-91, p. 249, sec. 5.

That portion of the above section relating to certificate of the judge is merely directory: *In re Warfield*, 22 Cal. 70. The certificate requires the seal of the court: Cal. Code Civ. Proc., sec. 153, subd. 2; as to other states, see this and the next sections.

Form No. 19.—Certificate of Probate of Will by Judge.

State of —, }
 — County. } ss.

I, —, judge of the — court of — county, state of —, do hereby certify:—

That on the — day of —, A. D. 18—, the annexed instrument was admitted to probate as the last will and testament of —, deceased; and from the proofs taken and the examinations had therein, the said court finds as follows:—

That — died on or about the — day of —, A. D. 18—, in the county of —, state of —, and at the time of his death he was a resident of —, county of —, state of —.

That the said annexed will was duly executed by said decedent in h— lifetime, in the county of —, state of —, in the presence of — and —, the subscribing witnesses thereto; also that —he acknowledged the execution of the same in their presence, and declared the same to be h— last will and testament, and the said witnesses attested the same at h— request and in h— presence; that the said decedent, at the time of executing said will as aforesaid, was over the age of eighteen years, was of sound mind, and not under duress, menace, fraud, or undue influence, or in any respect incompetent to devise and bequeath h— estate.

In witness whereof, I have signed this certificate and caused the same to be attested by the clerk of this court, under the seal thereof, this — day of —, A. D. 18—.

—, Judge of the — Court.

[SEAL]

Attest: —, Clerk.

By —, Deputy Clerk.

Form No. 20. — Certificate of Rejection of Will.

[Title of Court and Estate.]

State of —, }
— County. }

I, —, judge of the — court of the county of —, state of —, do hereby certify that on the — day of —, A. D. 18—, the annexed instrument was filed in the above-named court, together with the petition of —, praying that the same be admitted to probate as the last will and testament of —, deceased; and said matter coming on regularly for hearing before said court on the — day of —, A. D. 18—, and all and singular the proofs being heard by the court, and the matter being submitted for decision, entered its judgment rejecting said will, and ordered that the same be not admitted to probate.

In witness thereof I hereunto set my hand this — day of —, A. D. 18—. —, Judge of the — Court.

§ 21. [1318.] **Will to be Filed and Recorded.** — The will and a certificate of the proof thereof must be filed and recorded by the clerk, and the same, when so filed and recorded,

shall constitute part of the record in the cause or proceeding. All testimony shall be filed with the clerk.

Arizona. — "The will and a certificate of the proof thereof, together with all the testimony taken, must be filed by the clerk, and recorded by him in a book to be provided for the purpose." Rev. Stats., sec. 986.

"All original wills, together with the probate thereof, shall be deposited in the office of the probate judge of the county wherein the same shall have been probated, and shall there remain, except during such time as they may be removed to some other court by proper process for inspection." Rev. Stats., sec. 3250.

"Every such will, together with the probate thereof, shall be recorded by the clerk of the court wherein proved, in a book to be kept for that purpose, and certified copies of such will, and the probate of the same, or of the record thereof, may be recorded in other counties, and may be used in evidence as the original might be." Rev. Stats., sec. 3251.

Idaho. — "The will and a certificate of the proof thereof must be filed by the clerk, and recorded by him in a book to be provided for the purpose. All testimony shall be filed by the clerk." Rev. Stats., sec. 5314.

Montana. — Same as Arizona. Rev. Stats., sec. 986, *supra*. Comp. Stats., p. 281, sec. 26.

Nevada. — "The will and the certificate of proof thereof, together with the testimony which has been taken, shall be filed by the clerk, and recorded by him in a book to be provided for the purpose." Gen. Stats., sec. 2691.

Oregon. — "In all cases where any will is admitted to probate in the state of Oregon, in addition to having the same recorded in the county where the same was admitted to probate, it shall be the duty of the executor or administrator with the will annexed to have such will recorded in every county in the state in which the testator left any real property, in the record of deeds of such counties." Laws 1891, p. 3, sec. 1.

"Any person desiring to do so may have a certified copy made of any will heretofore probated in this state, and have the same recorded in any county in the state in which the testator left any real property, such person paying the necessary expense of such copy and record." Laws 1891, p. 3, 4, sec. 2.

"All acts or parts of acts in conflict with this act are hereby repealed." Laws 1891, p. 4, sec. 4.

Utah. — Same as California. Comp. Laws, sec. 4007.

Washington. — "All wills shall be recorded in a book kept for that purpose, within thirty days after probate, and the originals shall be carefully filed." Code Proc., sec. 868.

"Every will proved according to the provisions of this chapter, recorded, and certified by the judge of the superior court, and attested by the seal of said court, may be read as evidence, without any further proof." Code Proc., sec. 869.

"The record of any will made, proved, and recorded as aforesaid, and the exemplification of such record by the clerk in whose custody the same may be, shall be received as evidence, and shall be as effectual in all cases as the original would be if produced and proven." Code Proc., sec. 870.

'In all cases where lands devised by last will are situated in different counties, a copy of such will shall be recorded in the county auditor's office in each county within six months after probate.' Code Proc., sec. 871.

A will cannot be admitted as evidence until it has been duly admitted to probate: *Jones v. Dove*, 6 Or. 188

Form No. 21. — Order Admitting Will to Probate.

[Title of Court and Estate.]

The petition of —, heretofore filed herein, praying that a certain document purporting to be the last will and testament of —, deceased, be admitted to probate, and that — be appointed executor thereof, and that letters testamentary thereon be granted to him, coming on regularly to be heard this day, and it appearing to the court that said — died on or about the — day of —, A. D. 18—, at the — county of —, State of —, leaving estate in the — county of —, in this State; that said decedent was, at the time of his death, a resident of the — county of —, State of —; that said document is the last will and testament of said —, deceased; that said will was duly executed by him in his lifetime; that the same was lawfully attested as required by law; that said decedent, at the time of executing said will, was over the age of eighteen years, of sound mind, and not under duress, menace, fraud, or undue influence, or in any respect incompetent to execute said will; and that due and legal notice has been given of the hearing of said petition, —

It is therefore ordered that said document be and it is hereby admitted to probate as the last will and testament of —, deceased.

Dated —.

—, Judge of the — Court.

Form No. 22. — Order Appointing Executor.

(Use Form No. 21 down to the signature of the judge, and then add the following): —

It is further ordered that —, the person named in said will as executor, be and he is hereby appointed executor of said will and testament; and that letters testamentary thereon be issued to him, upon his taking the oath required by law, and giving a bond in the penal sum of \$—.

(If the will provides that the executor need not give bonds,

the order may read as follows, after the words "oath required by law," viz.: It being provided in said last will and testament that no bonds shall be required of the executor.)

Dated —, 18—. —, Judge of the — Court.

ARTICLE III.

PROBATE OF FOREIGN WILLS.

§ 22. Wills proved in other states to be recorded, when and where.

§ 23. Proceedings on the production of a foreign will.

§ 24. Hearing proofs of probate of foreign will.

§ 22. [1322.] Foreign Wills to be Recorded.—All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the superior court of any county in which the testator shall have left any estate.

Arizona.—Same. Rev. Stats., sec. 987.

Idaho.—Same. Rev. Stats., sec. 5315.

Montana.—Same. Comp. Stats., p. 281, sec. 27.

Nevada.—Same, with the following added: "Provided, it has been executed in conformity with the laws of this territory." Gen. Stats., sec. 2693.

Oregon.—"Any person not an inhabitant of, but owning property, real or personal, in, this state, may devise or bequeath such property by last will executed (if real estate be devised) according to the laws of this state, or if personal property be bequeathed, according to the laws of this state, or of the county, state, or territory in which the will may be executed." Laws 1891, p. 99, sec. 1, amending Hill's Laws, sec. 3082; Hill's Laws (ed. 1892), sec. 3082.

"If such will be probated in any other state or territory of the United States, or in any foreign country or state, copies of such will and of the probate thereof, certified by the clerk of the court in which such will was probated, with the seal of the court affixed thereto, if there be a seal, together with a certificate of the chief judge or presiding magistrate that the certificate is in due form and made by the clerk or other person having the legal custody of the record, shall be recorded in the same manner as wills executed and proved in this state, and shall be admitted in evidence in the same manner and with like effect." Laws 1891, p. 99, sec. 2, amending Hill's Laws, sec. 3083; Hill's Laws (ed. 1892), sec. 3083.

Utah.—Same as California, except after "United States," the words "or territories" inserted, and "probate" is substituted for "superior." Comp. Laws, sec. 4008.

Wyoming.—Same as California. Laws 1890-91, p. 247, sec. 14.

"When a will of personal property made by a person who resided without this state at the time of the execution thereof or at the time of his death has

be admitted to probate within the foreign country or within the state or territory of the United States where it was executed or where the testator resided at the time of his death, the district court having jurisdiction of the estate in this state, or the judge thereof in vacation, must, upon an application made as prescribed in this chapter, accompanied by a copy of the will and of the foreign letters, if any have been issued, authenticated as prescribed by an act of Congress of the United States relating to the authentication of the legislative acts and judicial proceedings of the states and territories of the United States, record the will and foreign letters, and issue thereupon ancillary letters testamentary or ancillary letters of administration with the will annexed, as the case may require." Laws 1890-91, p. 299, sec. 1.

"Where the will specially appoints one or more executors thereof, with respect to personal property situate within the state, the ancillary letters testamentary must be directed to the persons so appointed, or to those of them who are competent to act and qualify. If all of them are incompetent or fail to qualify, or in case where such appointment is not made, ancillary letters testamentary or ancillary letters of administration, issued as prescribed in this chapter, must be directed to the person named in the foreign letters, unless another person applies therefor and files with his petition an instrument executed by the foreign executor or administrator, or if there are two or more, all who have qualified and are acting under the foreign letters, and also acknowledged and proved and certified in like manner as a deed to be recorded in this state, authorizing the petitioner to receive such ancillary letters, in which case the district court, or the judge thereof in vacation, must, if the petitioner is a fit and competent person, issue such letters directed to him. When two or more persons are named in the foreign letters, or in the instrument executed as prescribed in this section, the ancillary letters may be directed to either or any of them, without naming the others, if the others fail to qualify, or if for good cause shown to the satisfaction of the district court, or of the judge thereof in vacation, it is so ordered or decreed; *provided*, that in all cases where ancillary letters testamentary or of administration, as provided in this chapter, are issued to a non-resident of this state, the sureties on the bond required of the person to whom such letters are directed must, in all cases, be *bona fide* residents of this state; and *provided further*, that immediately upon the issuance of such letters, the person or persons to whom they are directed shall make and file in the office of the clerk of court from which such letters issue, an instrument appointing some actual *bona fide* resident of this state, his or their agent or attorney upon whom all process and notice of every kind in all matters relating to such executorship or administration may be served with the same effect as if served upon the person or persons to whom such letters are directed; the appointment of such agent or attorney to be approved by the court, or the judge thereof." Laws 1890-91, pp. 299, 300, sec. 2.

"An application for ancillary letters testamentary or ancillary letters of administration, as prescribed in this chapter, must be made by petition, duly verified, which petition shall set forth the names of and the amount claimed by the creditors or persons claiming to be creditors of the deceased residing within

this state, so far as known to the petitioner. Upon the presentation thereof, the district court, or the judge thereof in vacation, must ascertain to its or his satisfaction whether any creditors or persons claiming to be creditors of the decedent reside within this state, and if so, the name and residence of each creditor or person claiming to be creditor, so far as the same can be ascertained, and thereupon a citation shall be issued by the clerk of the court, directed to each person whose name and residence has been ascertained, and also directed generally to all creditors of the decedent, notifying them of the application, and of the date and place when and where such application will be heard. Any person, although not cited by his name, may appear and contest the application, and thus make himself a party to the special proceedings. Such citation shall be personally served in the manner provided for the personal summons in civil actions upon the persons named, at least ten days before the date fixed for the hearing, and a general notice to all creditors (not naming them) of such application, and requiring them to appear at such date and place, shall be published in two consecutive issues of a weekly newspaper of general circulation, published in the county in the district court in which the application is filed." Laws 1890-91, p. 300, sec. 3.

"Upon the day fixed for the hearing of the application, the district court, or judge thereof in vacation, must ascertain, as nearly as can be done, the amount of debts due from the decedent to the residents of this state, which finding of the court or judge shall be filed with and made supplemental to the original petition in the proceeding. Before ancillary letters are issued, the person to whom they are awarded must qualify as provided for the qualification of an administrator upon the estate of an intestate, except that the penalty of the bond may, in the discretion of the court, or of the judge thereof, be in such sum not exceeding double the amount which appears to be due from the decedent to residents of this state as will, in the opinion of the court or judge, effectually secure payment of those debts, or the sum which the resident creditors will be entitled to receive from the persons to whom the letters are issued, upon an accounting and distribution, either within this state, or within the jurisdiction where the principal letters are issued." Laws 1890-91, p. 301, sec. 4.

"No ancillary letters of administration shall be issued in cases where original administration is had within the state." Laws 1890-91, p. 301, sec. 5.

§ 23. [1323.] Proceedings on Foreign Will.—When a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the court or judge must appoint a time for the hearing; notice whereof must be given as hereinbefore provided for an original petition for the probate of a will.

Arizona. — Same. Rev. Stats., sec. 988.

Idaho. — Same. Rev. Stats., sec. 5316.

Montana. — Same. Comp. Stats., p. 282, sec. 23.

Nevada. — Same. Gen. Stats., sec. 2694.

Utah. — Same, except that "clerk" is substituted for "judge." Comp. Laws, sec. 4009.

Washington. — "Wills probated in any other state or territory of the United States, or in any foreign country or state, shall be admitted to probate in this state on the production of a copy of such will, and of the original record of probate thereof, authenticated by the attestation of the clerk of the court in which such probate was made; or if there be no clerk, by the attestation of the judge thereof, and by the seal of office of such officers if they have a seal." Code Proc., sec. 882.

"All provisions of law relating to the carrying into effect of domestic wills after probate shall, so far as applicable, apply to foreign wills admitted to probate in this state, as contemplated in the preceding section." Code Proc., sec. 883.

Wyoming. — Same as California. "Commissioner" may also act. Laws 1890-91, p. 247, sec. 15.

Petition, Notice, etc.: See §§ 4-23, *ante*.

Coverture is no bar to the pre- wherein to apply for revocation there-
scription of one year after probate of: *In re Broderick*, Myr. Prob. 19.

Form No. 23.—Petition for Probate of Foreign Will.

[Caption, Form 1, § 5, *ante*.]

1. That — died on or about the — day of —, A. D. 18—, at the county of —, state of —, and was at the time of his death a resident of the county of —, in the state of —; that he left a last will and testament, which has been duly admitted to probate in the — court of the county of —, state of —, an exemplified copy of which last will and testament, and of the order of said court admitting it to probate, is presented and filed herewith and made a part hereof; that said court at the time of making said order was a court of competent jurisdiction, and had jurisdiction of the subject-matter and of all parties interested in the estate of said decedent; that petitioner is interested in said estate.

2. (Follow subdivision 2 and the balance of Form No. 2.)

Form No. 24.—Order Appointing Time for Hearing Petition for Probate of Foreign Will.

[Title of Court and Estate.]

On reading and filing the petition of —, praying for the probate of a document purporting to be the last will and testament of —, deceased, which said will has been duly proved

and allowed in the state of —; and a copy of said will and the probate thereof duly authenticated having been produced by the executor named therein (or by —, one of the legatees or devisees named in said will), and filed herein,—

It is ordered that —, the — day of —, A. D. 18—, be and the same is hereby appointed as the time for the hearing of said petition, and the clerk of this court is hereby directed to give due and legal notice thereof.

Dated —.

—, Judge of the — Court.

§ 24. [1324.] Hearing Proofs of Probate of Foreign Will.—If, on the hearing, it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate, and have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration issued thereon.

Arizona.—Same. Rev. Stats., sec. 989.

Idaho.—Same. Rev. Stats., sec. 5317.

Montana.—Same. Comp. Stats., p. 282, sec. 29.

Nevada.—“If, on hearing, it shall appear to the court that the instrument ought to be allowed as the will of the deceased, the authenticated copy shall be admitted to probate and recorded the same as in the case of other wills, and the will shall have the same force and effect as if it had been originally proved and allowed in the same court.” Gen. Stats., sec. 2695.

“If, on hearing, it shall appear to the court that the instrument ought to be allowed as the will of the deceased, a copy shall be filed and recorded, and the will shall have the same force and effect as if it had been originally proved and allowed in the same court.” Gen. Stats., sec. 2696.

Oregon.—“Any such will may be contested and annulled within the same time and in the same manner as wills executed and proven in this state.” Hill’s Laws, sec. 3084. See secs. 3082, 3083, under § 22, *ante*.

Utah.—Same as California, except that “or territory” is inserted after “United States.” Comp. Laws, sec. 4010.

Washington.—See last section.

Wyoming.—Same as California. Laws 1890-91, p. 247, sec. 16.

The question as to whether or not a will had been duly proved and allowed in a foreign country or state is a fact which a court of this state entertaining jurisdiction to admit such will to probate must find from the evidence, and if the court found this fact upon insuffi-

cient evidence, or without proper authentication of the foreign probate of the will, or without competent evidence, and thereupon proceeded to exercise jurisdiction, the action of the court in this respect is not void, but merely erroneous, and subject only to direct attack upon appeal, and is not open to collateral attack in an action of ejectment in which the probate proceedings had in this state upon proof

of such foreign probate are introduced in evidence to show title under the will: *Goldtree v. McAlister*, 86 Cal. 93.

The probate of a will and issue of letters testamentary in the state of New York do not authorize the executors to maintain actions for the collection of assets of the estate of the deceased in the state of California: *Bartlett v. Rogers*, 3 Saw. 62.

Form No. 25.—Order Admitting Foreign Will to Probate.

[Title of Court and Estate.]

The petition of —, asking that a document filed therewith, purporting to be the last will and testament of —, deceased, be admitted to probate, and that —, who is named therein as executor, be appointed as such, and that letters testamentary be issued to said —, coming on regularly this day to be heard, and due proof being made that notice has been duly given of the time appointed by this court for proving said will and hearing said petition; that said order has been duly served upon all parties interested in said estate according to law; that said — died testate, at —, on the — day of —, A. D. 18—; and it appearing by the duly authenticated copy of said will and the probate thereof that said will has been proved, allowed, and admitted to probate in another of the United States, to wit, in the state of (—) (or in a foreign country, to wit, France); and it further appearing that said will was duly executed according to the law of said state;¹ and it appearing that the personal property of said estate situated in this state is of the value of five thousand dollars, and that the annual rents and profits of the realty belonging thereto situated in this state amount to one thousand dollars,—it is therefore ordered that said will be and the same is hereby admitted to probate, and that letters testamentary be issued thereon to

¹ In lieu of the clause, "that said will was duly executed according to the law of said state," may be substituted the following: "That said will was duly executed according to the law of —, the place in which said testator was domiciled at the time of his death," or "that said will was duly executed according to the laws of this state."

—, the person named in said will as executor, upon his giving bonds in the sum of twelve thousand dollars, to be approved by the judge of this court (or in case the will requests that he be appointed without bonds, the order may be "that letters testamentary issue to —, the person named in said will, without bonds, the testator having so directed in his will.")

Dated —. —, Judge of the — Court.

ARTICLE IV.

CONTESTING WILL AFTER PROBATE.

- § 25. The probate may be contested within one year.
- § 26. Citation to be issued to parties interested.
- § 27. The hearing had on proof of service.
- § 28. Petitions to revoke probate of will tried by jury or court — Judgment.
- § 29. On revocation of probate, powers of executor, etc., cease, but not liable for acts in good faith.
- § 30. Costs and expenses, by whom paid.
- § 31. Probate, when conclusive — One year after removal of disability given to infants and others.

§ 25. [1327.] Will may be Contested. — When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will, or against the sufficiency of the proof, and praying that the probate may be revoked.

Arizona. — Same. Rev. Stats., sec. 990.

Idaho. — Same. Rev. Stats., sec. 5318.

Montana. — Same. Comp. Stats., p. 282, sec. 30.

Nevada. — Same. Gen. Stats., sec. 2697.

Utah. — Same, except that "who has not previously contested" is inserted after the word "interested." Comp. Laws, sec. 4011.

Washington. — "If any person interested in any will shall appear within one year after the probate or rejection thereof, and by petition to the superior court having jurisdiction, contest the validity of said will, or pray to have the will proven which has been rejected, he shall file a statement containing his objections and exceptions to said will, or to the rejection thereof. Issues shall be made up, tried, and determined in said court respecting the competency of the deceased to make last will and testament, or respecting the exe-

cution by the deceased of such last will and testament under restraint, or undue influence, or fraudulent representations, or for any other cause affecting the validity of such will. Code Proc., sec. 872.

Wyoming. — Same as California. Laws 1890-91, p. 249, sec. 6.

In a contest of a will after probate, the burden of proving the will is on the proponent, the same as if the will had never been probated: *Hubbard v. Hubbard*, 7 Or. 42.

Parties represented by an attorney appointed by court at contest of will may, within a year from its admission to probate, contest the same: *In re Cunningham*, 54 Cal. 556; See also § 12, *ante*.

The right of heirs to revoke probate of a will is the same whether the issues are tried by a jury or by the court: *In re Cunningham*, Myr. Prob. 214.

A petition to revoke the probate of a will, if the parties are under no disabilities, must be filed within a year after the will is admitted to probate. The judge cannot order the clerk to file it as of a day within the year: *In re Sbarboro*, 63 Cal. 5.

If petition for revocation of probate of a will be filed within the year in which it may be filed, citation thereunder may be issued after that year has expired: *In re Sbarboro*, Myr. Prob. 255.

Coverture is no bar to the prescription of one year after probate wherein to apply for revocation thereof: *In re Broderick*, Myr. Prob. 19.

Non-resident alien loses right to petition for revocation of probate of will when: *In re Broderick*, Myr. Prob. 19.

Codicil must be offered for probate within a year after the probate of the original will: *In re Adsit*, Myr. Prob. 266.

Undue influence, restraint, fraudulent misrepresentations, facts of, must be stated in petition for revocation of probate: *In re Clarke*, Myr. Prob. 259.

Form No. 26. Petition to Revoke Probate of Will.

[Caption, Form 1, § 5, *ante*.]

1. That — died at the — county of —, state of —, on the — day of —, A. D. 18—, and at the time of his death was a resident of the — county of —, state of —; that afterwards a document was filed in this court for probate as the last will and testament of deceased, and such proceedings were had herein that an order was duly made and entered by this court on the — day of —, A. D. 18—, admitting said document to probate as such last will and testament, and letters testamentary thereon were by said order issued to — as the executor thereof, and thereupon said — duly qualified and received said letters and entered upon his duties as such executor, and is now administering upon the estate of said decedent;

2. That your petitioner is the father and one of the heirs at law of said decedent, and is interested in said estate;

3. That petitioner is informed and believes, and therefore alleges the fact to be, that said document is not the last will

and testament of said decedent, but said document is a forged instrument, and was made by —, and the signature of said deceased was falsely and fraudulently forged thereto by said — after the death of said decedent; —

Wherefore, your petitioner prays that said order may be set aside and the probate of said pretended will and testament be revoked; that the letters testamentary heretofore issued to said — be revoked; that your petitioner be appointed administrator of said estate. —, Petitioner.

—, Attorney for Petitioner.

**Form No. 27.—Petition to Revoke Probate of Will
and for the Probate of a Later Will.**

[Caption, Form 1, § 5, *ante*.]

1. That — died in the — county of —, state of —, on the — day of —, A. D. 18—, being at that time a resident of the — county of —, state of —; and thereafter such proceedings were had in this court that a document dated on the — day of —, A. D. 18—, was duly admitted to probate by this court by its order made and entered on the — day of —, A. D. 18—, and —, who was named in said document as executor, was duly appointed as such by said order, and immediately qualified and entered upon the duties of his trust as the executor of the last will and testament of said decedent;

2. That said document was not the last will and testament of said decedent, and a last will and testament has, since the entry of said order, been discovered, which was duly published by said decedent and authenticated as required by law, and is presented to the court for probate and filed herewith.

(Follow subsds. 2, 3, 4, and 5 of Form No. 2.)

Wherefore, petitioner prays that the probate of said document hereinbefore first referred to be revoked; that the letters testamentary heretofore issued herein to — be revoked; that the document last hereinbefore referred to as the last will and testament of said decedent be admitted to probate, and that letters testamentary thereon be issued to —, the person named in said last-mentioned will and testament as the executor thereof. —, Petitioner.

—, Attorney for Petitioner.

§ 26. [1328.] Citation to be Issued to Parties Interested.—Upon filing the petition, a citation must be issued to the executors of the will, or to the administrators with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the state, so far as known to the petitioner, or to their guardians if any of them are minors, or to their personal representatives if any of them are dead, requiring them to appear before the court on some day of a regular term therein specified, to show cause why the probate of the will should not be revoked.

Arizona.—Same. Rev. Stats., sec. 991.

Idaho.—Same. Rev. Stats., sec. 5319.

Montana.—Same. Comp. Stats., p. 282, sec. 31

Nevada.—Same. Gen. Stats., sec. 2698.

Utah.—Same. Comp. Laws, sec. 4012.

Washington.—“Upon the filing of the petition referred to in the next preceding section, a citation shall be issued to the executors who have taken upon them the execution of the will, or to the administrators with the will annexed, and to all legatees named in the will residing in the state, or to their guardians if any of them are minors, or their personal representatives if any of them are dead, requiring them to appear before the court on a day therein specified, to show cause why the petition should not be granted.” Code Proc., sec. 873.

Wyoming.—Same as California. Laws 1890-91, p. 249, sec. 7.

Filing petition and issuing citation are ministerial acts which can be performed only by the clerk of the court: *In re Sbarboro*, 63 Cal. 5.

Citation: See § 317-321, *post*.

Form No. 28. — Order of Citation on Application to Revoke Probate of Will.

[Title of Court and Estate.]

The petition of —, one of the heirs at law of the above-named decedent, having been filed herein, praying that the probate of the will of said decedent be revoked;—

It is ordered that a citation issue herein, directed to the executor of said estate, and — and —, all the legatees and devisees of said deceased, and all his heirs at law residing in this state, directing them to appear in this court on —, the — day of —, A. D. 18—, at the hour of ten o'clock, A. M., of said day, and show cause, if any they can, why the probate of said will should not be revoked.

—, Judge of the — Court.

Dated —, 18—.

Form No. 29.—Citation on Application to Revoke Probate of Will.

[Title of Court and Estate.]

To —, the executor of the estate of —, deceased, —, and —, devisees and legatees named in the will of said deceased, and — and —, heirs at law of said deceased:—

You and each of you are hereby notified that a petition has been filed in the above-entitled court by — to revoke the probate of the will of —, deceased, and you are cited to appear in said court on the — day of —, A. D. 18—, at the hour of ten o'clock, A. M., of said day, and show cause, if any you can, why the probate of said will should not be revoked.

(SEAL)

—, Clerk.

By —, Deputy Clerk.

Form No. 30.—Order Revoking Probate of Will.

[Title of Court and Estate.]

—, having filed his petition in writing containing his allegations against the validity of the document heretofore admitted to probate by this court as the last will and testament of —, deceased, for the purpose of contesting the validity thereof, and praying that the probate of said will be revoked, and thereupon a citation was duly issued out of this court to —, to whom letters testamentary were issued upon said will, and to all the legatees and devisees of said deceased, and to all his heirs at law residing in this state, requiring them to show cause, at a time and place named in said citation, why the probate of said will should not be revoked, and it appearing that said citation was duly served upon all the parties named therein, and that all the necessary and proper orders in the premises have been made, and all of said parties having appeared herein as required in the said citation, said matter came on regularly for hearing on this — day of —, A. D. 18—, upon said petition and the answers thereto,¹ and the court, no jury having been demanded, having heard the proofs of the parties, and it appearing there-

¹ If a jury has been demanded, write in lieu of the words standing between ¹ and ² the following: "And a jury, having been demanded as provided by law, was impaneled and sworn, and they proceeded to try the issues presented by said petition and the answer thereto; and the findings and verdict of said jury having been filed, in pursuance of said findings and verdict, it is ordered," etc.

from that said petition was filed within the time required by law; that said document is not the last will and testament of said —, deceased, but is a forged instrument, and was made by —, and the signature of said deceased to said instrument was falsely and fraudulently forged thereto by said — after the death of said decedent;—

It is therefore ordered² that the said probate of said will be and it is hereby annulled and revoked, and the letters testamentary issued thereon to — are hereby revoked; that the costs and expenses of this proceeding be paid by —, said executor, out of the property of said estate; that the said petitioner, —, be and he is hereby appointed administrator *de bonis non* of said estate upon his filing a bond according to law in the sum of — dollars, and taking his oath of office.

Dated —, 18—. —, Judge of the — Court.

§ 27. [1329.] Trial of Contest.—At the time appointed for showing cause, or at any time to which the hearing is postponed, personal service of the citations having been made upon any persons named therein, the court must proceed to try the issues of fact joined in the same manner as in an original contest of a will.

Arizona.—Same. Rev. Stats., sec. 992.

Idaho.—Same. Rev. Stats., sec. 5320.

Montana.—Same. Comp. Stats., p. 282, sec. 32.

Nevada.—Same, to and including the word “therein”; then as follows: “The court shall proceed to hear the proofs of the parties. If any devisees or legatees named in the will shall be minors, and have no guardians, the court shall appoint some attorney to represent them.” Gen. Stats., sec. 2699.

Utah.—Same as California, with the following added: “If, upon hearing the proofs of the parties, the court shall decide that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked.” Comp. Laws, sec. 4013.

Washington.—See Code Proc., sec. 872, under § 25, *ante*.

Wyoming.—Same as California. Laws 1890-91, p. 249, sec. 8.

Findings: *In re Crosby*, 55 Cal. 574.

Issues to be tried, how: *In re Cunningham*, 54 Cal. 557.

Service: See § 11, *ante*.

In proceedings to revoke probate of will on ground of mental incapacity of testatrix at time of execution of will, where a physician who had attended testatrix for a long time

prior to the making of the will testified to a state of facts tending to prove her capacity, it is error to sustain objections to questions upon cross-examination as to whether the witness had not asked another person to testify in the action that she was not in her right mind, etc.: *Wixom v. Goodcell*, 90 Cal. 622.

§ 28. [1330.] Trial — Judgment. — In all cases of petitions to revoke the probate of a will wherein the original probate was granted without a contest, on written demand of either party filed three days prior to the hearing, a trial by jury must be had as in cases of the contest of an original petition to admit a will to probate. If upon hearing the proofs of the parties, the jury shall find, or if no jury is had, the court shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked.

Arizona. — Same. Rev. Stats., sec. 993.

Idaho. — Same. Rev. Stats., sec. 5321.

Montana. — Same. Comp. Stats., p. 282, sec. 33.

Nevada. — "If, upon the hearing of the proofs of the parties, the court shall decide that the will is for any reason invalid, or that it is not sufficiently proved to have been the last will of the testator, the probate shall be annulled and revoked." Gen. Stats., sec. 2700.

Utah. — See Comp. Laws, sec. 4013, under last section.

Washington. — Same as Nevada. Code Proc., sec. 876.

Wyoming. — Same as California, except that all is omitted from "without a contest," to and including "if no jury is had," and the word "if" is inserted in place of the omitted matter. Laws 1890-91, p. 249, sec. 9.

Jury: See §§ 16, 17, *ante*.

If probate of will is annulled upon a contest initiated by an heir after the entry of a decree of distribution, the heir may pursue the property, and perhaps its proceeds, in the hands of the distributee, but cannot recover it from a *bona fide* purchaser: *Thompson v. Sampson*, 64 Cal. 330.

In a will contest in which the jury found the will to be void for want of testamentary capacity,

undue influence, fraud, and menace, judgment was rendered annulling and revoking the will as to contestant, and adjudging the contestant not bound by the will, and that she take the same share as if decedent had died intestate, it was held that such judgment was void, and could not be reviewed on appeal, although by stipulation no exception was taken to its form: *In re Freud*, 73 Cal. 555.

§ 29. [1331.] Effect of Revocation. — Upon the revocation being made, the powers of the executor or administrator with the will annexed must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation.

Arizona. — Same. Rev. Stats., sec. 994.

Idaho. — Same. Rev. Stats., sec. 5322.

Montana. — Same. Comp. Stats., p. 283, sec. 34.

Nevada. — Same. Gen. Stats., sec. 2701.

Oregon. — "If, after administration has been granted upon an estate, a will of the deceased be found and proven, the letters of administration shall be

revoked, and letters testamentary or of administration with the will annexed shall be issued; and if, after a will has been proven, and letters testamentary or of administration with the will annexed have been issued thereon, such will should be set aside, declared void or inoperative, such letters shall be revoked, and letters of administration issued": Hill's Laws, sec. 1093.

Utah. — Same as California. Comp. Laws, sec. 4014.

Washington. — Same as California, except that "to service of written notice of intention to contest said will" is substituted for the word "revocation," in the last line. Code Proc., sec. 877.

"If, after a will has been found and letters thereon granted, the will shall afterwards be set aside, the letters shall be revoked, and letters of administration granted on the goods unadministered." Code Proc., sec. 888.

Wyoming. — Same as California. Laws 1890-91, p. 250, sec. 10.

Appeal from an order revoking probate of will does not keep alive the character of executor for any purposes except those of the appeal: *In re Crozier*, 65 Cal. 332.

§ 30. [1332.] Costs and Expenses. — The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs.

Arizona. — Same. Rev. Stats., sec. 995.

Idaho. — Same. Rev. Stats., sec. 5323.

Montana. — Same. Comp. Stats., p. 283, sec. 35.

Nevada. — Same. Gen. Stats., sec. 2702.

Utah. — Same. Comp. Laws, sec. 4015.

Washington. — "The fees and expenses shall be paid by the losing party. If the probate be revoked or the will annulled, the party who shall have resisted such revocation shall pay the costs and expenses of proceedings out of the property of the deceased." Code Proc., sec. 878.

Wyoming. — Same as California. Laws 1890-91, p. 250, sec. 11.

Order amending judgment as to costs, and directing payment in due course of administration, is regular, unless the record shows a want of notice: *In re Crozier*, 74 Cal. 180.

§ 31. [1333.] Probate, when Conclusive. — If no person within one year after the probate of a will contests the same, or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind a like period of one year after their respective disabilities are removed.

Arizona. — Same. Rev. Stats., sec. 996.

Idaho. — Same. Rev. Stats., sec. 5324.

Montana. — Same. Comp. Stats., p. 283, sec. 36.

Nevada. — Same, except that "married women" are included in the saving clause concerning disabilities. Gen. Stats., sec. 2703.

Utah. — Same as California. Comp. Laws, sec. 4016.

Washington. — Same as California, except that the words "married women, persons absent from the United States; or" are substituted for the words "and persons." Code Proc., sec. 874.

Wyoming. — Same as California. Laws 1890-91, p. 250, sec. 12.

Judgment admitting will to probate is conclusive: *Rogers v. King*, 22 Cal. 72; *State v. McGlynn*, 20 Cal. 233.

Conclusiveness of probate: Cal. Code Civ. Proc., sec. 1908; *In re Sbarboro*, 63 Cal. 5.

Probate may be conclusive as to adult heirs who have allowed time for contesting to lapse, and voidable as to an infant heir applying in time: *Thompson v. Samson*, 64 Cal. 330.

Non-resident alien loses right

to petition for revocation of probate of will when: *In re Broderick*, Myr. Prob. 19.

After the time limited in the above section, the will is conclusive as against an application to declare a devise void for fraud upon the testator: *In re Maxwell*, 74 Cal. 384.

An election by a widow to take under the law, rather than under her husband's will, is not a contest thereof within the meaning of the above section: *In re Gwin*, 77 Cal. 313.

ARTICLE V.

PROBATE OF LOST OR DESTROYED WILL.

§ 32. Proof of lost or destroyed will to be taken.

§ 33. Must have been in existence at time of death.

§ 34. To be certified, recorded, and letters thereon granted.

§ 35. Court to restrain injurious acts of executors or administrators during proceedings to prove lost will.

§ 32. [1338.] Proof of Lost Will. — Whenever any will is lost or destroyed, the superior court must take proof of the execution and validity thereof, and establish the same; notice to all persons interested being first given as prescribed in regard to proofs of wills in other cases. All the testimony must be reduced to writing, and signed by the witnesses.

Arizona. — Same. Rev. Stats., sec. 997.

Idaho. — Same. Rev. Stats., sec. 5325.

Montana. — Same. Comp. Stats., p. 283, sec. 37.

Nevada. — Same. Gen. Stats., sec. 2704.

Utah. — Same. Comp. Laws, sec. 4017.

Washington. — Same. Code Proc., sec. 879.

Wyoming. — Same, except that "district" is inserted in lieu of "superior," and after "court" this clause is inserted, viz.: "Or judge thereof in vacation," and at the end of the section the following is added: "And may be taken before the commissioner or clerk." Laws 1890-91, p. 250, sec. 1.

Notice: See §§ 8, 9, *ante*; also Cal. Code Civ. Proc., sec. 1010.

Form No. 31.—Petition to Establish Lost or Destroyed Will.

[Caption, Form 1, § 5, *ante*.]

1. That — died on or about the — day of —, A. D. 18—, at — county of —, state of —, and was at the time of his death a resident of the — county of —, state of —;

2. That in his lifetime deceased made a will, which was in existence and had not been revoked at the time of — death, but has been destroyed since the death of said testator (or was fraudulently destroyed during his lifetime by one —, etc.); that petitioner is interested in the estate of decedent;

3. That the provisions of said will can be clearly and distinctly proved by two credible witnesses, to wit: — and —.

4. (Follow subd. 2, in Form No. 2.)

5. (Follow subd. 3, in Form No. 2.)

6. (Follow subd. 4, in Form No. 2.)

7. (Follow subd. 5, in Form No. 2.)

Wherefore petitioner prays that the proof of the execution and validity of said will be taken by the court as provided by law; that said will be established, the provisions thereof distinctly stated and certified by the judge of this court under his hand and the seal of the court; that said will so established be admitted to probate; that petitioner be appointed executor of said last will and testament, and that letters testamentary thereon be issued to him.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 32.—Petition to Establish Lost or Destroyed Will, and to Revoke Letters of Administration.

(Follow Form No. 31 to the prayer.)

8. That letters of administration upon the estate of said deceased were heretofore granted to — by the order of this court duly made and entered; that said — immediately qualified as such administrator under said order, and entered upon the discharge of his duties as such, and thence hitherto has been and now is such administrator;—

Wherefore petitioner prays that the proof of the execution and validity of said will be taken by the court as provided by law; that said will be established, the provisions thereof distinctly stated and certified by the judge of this court under his hand and the seal of the court; that said will as established be admitted to probate; that said letters of administration heretofore issued to said — be revoked; that petitioner be appointed executor of said last will and testament, and that letters testamentary thereon be issued to him. —, Petitioner.

—, etc., Attorney for Petitioner.

Form No. 33.—Petition to Establish Lost or Destroyed Will, and to Revoke Probate of a Prior Will and the Letters Testamentary Issued thereunder.

[Caption, Form 1, § 5, *ante*.]

1. (Follow subd. 1 of Form No. 27.)

2. That said document was not the last will and testament of said decedent; that since the entry of said order of this court it has been discovered that said decedent duly published and authenticated as required by law a last will and testament of a later date than the one heretofore admitted to probate herein, which revokes said former will;

3. That said last-named will was in existence at the time of decedent's death, but has been destroyed since the death of said testator (or was fraudulently destroyed in — lifetime by one —, etc.).

4. (Follow subd. 2 of Form No. 2.)

5. (Follow subd. 3 of Form No. 2.)

6. (Follow subd. 4 of Form No. 2.)

7. (Follow subd. 5 of Form No. 2.)

Wherefore petitioner prays that the proof of the execution and validity of said last-named will be taken by the court as provided by law; that said will be established, the provisions thereof distinctly stated and certified by the judge of this court under his hand and the seal of the court; that the will heretofore admitted to probate be declared not to be the last will and testament of said decedent, and that the probate thereof, and the letters testamentary issued thereunder to —, be revoked;

that said will as established be admitted to probate; that petitioner be appointed executor thereof, and that letters testamentary thereon be issued to him. —, Petitioner.

—, Attorney for Petitioner.

§ 33. [1339.] Must Exist at Time of Death.—No will shall be proved as a lost or destroyed will unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

Arizona.—Same. Rev. Stats., sec. 998.

Idaho.—Same. Rev. Stats., sec. 5326.

Montana.—Same. Comp. Stats., p. 283, sec. 38.

Nevada.—Same. Gen. Stats., sec. 2705.

Utah.—Same. Comp. Laws, sec. 4018.

Washington.—Same. Code Proc., sec. 879.

Wyoming.—Same. Laws 1890-91, p. 250, sec. 2.

If a will was lost or destroyed after the death of the testator, it must, in an application for the probate of such will, be alleged, and it must be proved to have been in existence at the time of such death: *In re Kidder*, 57 Cal. 283.

If a will was lost or destroyed before the death of the testator, it must, in an application for the probate of such will, be alleged, and it must be proved to have been *fraudulently* destroyed during the lifetime of the testator: *In re Kidder*, 57 Cal. 283.

A petition for the probate of a will alleged to have been fraudulently destroyed during the lifetime of the testator must state the facts and circumstances constituting the fraudu-

lent destruction: *In re Kidder*, 66 Cal. 489, 490.

The provisions of a lost will must be clearly and distinctly proven by at least two credible witnesses, on an application to have it admitted to probate: *In re Kidder*, 66 Cal. 489, 491.

Evidence showing that at the time of the destruction of a will testatrix was ill in bed, and that her nurse, her sole attendant, handed her the will, which then either fell accidentally or was thrown by the testatrix into the fire and was consumed, the nurse, though she saw it burning, making no effort to save it, does not amount to proof of a fraudulent destruction of the will by the nurse: *In re Kidder*, 66 Cal. 489, 490.

§ 34. [1340.] Certificate to be Recorded.—When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge under his hand and the seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration with the will annexed must be issued thereon in the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified, and

filed as in other cases, and shall have the same effect as evidence as provided in section thirteen hundred and sixteen.

See § 19, *ante*, for sec. 1316.

Arizona. — Same. Rev. Stats., sec. 999.

Idaho. — “When a lost will is established, the provisions thereof must be distinctly stated and certified by the probate judge under his hand and the seal of his court, and the certificate, together with the testimony upon which it is founded, must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration with the will annexed must be issued thereon in the same manner as upon wills produced and duly proved.” Rev. Stats., sec. 5327.

Montana. — Same as California. Comp. Stats., p. 283, sec. 39.

Nevada. — “When any will shall be established, the provisions thereof shall be distinctly stated and certified by the probate judge under his hand and the seal of his court, and the certificate, together with the testimony upon which it is founded, shall be recorded as other wills are required to be recorded, and letters testamentary or of administration with the will annexed shall be issued thereon in the same manner as upon wills produced and duly proved.” Gen. Stats., sec. 2706.

Utah. — Same as California. Comp. Laws, sec. 4019.

Washington. — “When any such will shall be established, the provisions thereof shall be distinctly stated in the judgment establishing it, and a copy of such decree shall be certified by the clerk under the seal of the court; and such copy, together with the testimony upon which the decree is founded, shall be recorded as other wills are required to be recorded, and letters testamentary or of administration with the will annexed shall be issued thereon in the same manner as upon wills produced and duly proved.” Code Proc., sec. 880.

Wyoming. — Same as California. Laws 1890-91, p. 250, sec. 3.

Form No. 34.—Certificate Establishing Lost or Destroyed Will.

[Title of Court and Estate.]

Now, on this — day of —, A. D. 18—, the petition of — to establish as the last will and testament of —, deceased, a certain lost (or destroyed) will of said decedent, and it appearing that said — died on or about the — day of —, A. D. 18—, at the — county of —, state of —, and was at the time of his death a resident of the — county of —, state of —;

That in his lifetime said deceased made a will, which was in existence and had not been revoked at the time of his death (or was fraudulently destroyed in his lifetime) by one —, under the following circumstances (state fully as can be done

all facts and circumstances of fraud connected with such destruction); that said petitioner — is interested in the estate of said decedent, being a legatee under said lost (or destroyed) will;

That the provisions of said will were clearly and distinctly proved by two credible witnesses, to wit, — and —, whose testimony was reduced to writing, signed by said witnesses respectively, and filed herein;

That the provisions of said will as proven by said witnesses are as follows: —

1. Said decedent gave and bequeathed all of the community property of which by law he could make testamentary disposition to his two children, — and —, share and share alike, and provided in said will that his wife, —, should have that portion of the community property to which she was entitled by law, to wit, one half, and that he deemed that said half of said community property would be a sufficient provision for her; that all the property possessed by him was and is the community property of himself and his said wife, —;

2. He appointed his said wife executrix of his said last will and testament, and therein requested that she be appointed such without bonds, and also appointed as the guardian of his said children;

That said will was, on or about the — day of —, 18—, duly executed by said —, deceased, in his lifetime, in the — county of —, state of —, in the presence of — and —, the subscribing witnesses thereto; that decedent acknowledged the execution of the same in their presence, and declared it to be his last will and testament, and the said witnesses attested the same at his request and in his presence, by subscribing their names as witnesses thereto;

That said decedent at the time of executing said will was over the age of eighteen years, was of sound mind, and not under duress, menace, or undue influence, or in any respect incompetent to devise and bequeath his estate.

In witness whereof, I have granted this certificate under my hand and the seal of the court this — day of —, A. D. 18—, and have caused the same to be attested by the clerk of this court.

—, Judge of the — Court.

(SEAL)

Attest: —, Clerk.

§ 35. [1341.] Duty of Court. — If before or during the pendency of an application to prove a lost or destroyed will letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors so appointed from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.

Arizona. — Same. Rev. Stats., sec. 1000.

Idaho. — Same. Rev. Stats., sec. 5328.

Montana. — Same. Comp. Stats., p. 284, sec. 40.

Nevada. — Same. Gen. Stats., sec. 2707.

Utah. — Same. Comp. Laws, sec. 4020.

Washington. — Same. Code Proc., sec. 881.

Wyoming. — Same, except that the words "or judge in vacation" are inserted after the word "court," in the fifth line. Laws 1890-91, p. 250, sec. 4.

ARTICLE VI.

THE PROBATE OF NUNCUPATIVE WILLS.

§ 36. Nuncupative wills, when and how admitted to probate.

§ 37. Additional requirements in probate of nuncupative wills.

§ 38. Contests and appointments to conform to provisions as to other wills.

§ 36. [1344.] Nuncupative Wills. — Nuncupative wills may at any time within six months after the testamentary words are spoken by the decedent be admitted to probate on petition and notice as provided in Article I., Chapter II., of this title. The petition, in addition to the jurisdictional facts, must allege that the testamentary words, or the substance thereof, were reduced to writing within thirty days after they were spoken, which writing must accompany the petition.

For Article I., Chapter II., of this title, see §§ 3-14, *ante*.

Nuncupative Wills: See §§ 382-385, *post*.

Arizona. — Same, except "six" is substituted for "thirty" in seventh line. Rev. Stats., sec. 1001.

Idaho. — Same as California. Rev. Stats., sec. 5329.

Montana. — Same as California. Comp. Stats., p. 284, sec. 41.

Nevada. — "No nuncupative or verbal will shall be good where the estate bequeathed exceeds the value of one thousand dollars, nor unless the same be proved by two witnesses who were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid some

one present to bear witness that such was his will, or words of like import, nor unless such nuncupative will was made at the time of the last sickness of the deceased." Gen. Stats., sec. 3004.

"No proof shall be received of any nuncupative will unless it be offered within three months after speaking the testamentary words." Gen. Stats., sec. 3005.

"No probate of any nuncupative will shall be granted for fourteen days after the death of the testator, nor shall any nuncupative will be at any time proved unless the testamentary words, or the substance thereof, be first committed to writing by the probate judge, and process be issued to call in the widow, should she be a resident of the territory, or other person or persons interested as heirs of the testator residing in the territory to contest the probate of such will, if they think proper." Gen. Stats., sec. 3006.

Utah. — Same as California. Comp. Laws, sec. 4021.

Wyoming. — Same as California. Laws 1890-91, p. 251, sec. 5.

Form No. 35. — Petition for Probate of Nuncupative Will.

[Caption, Form 1, § 5, *ante*.]

1. (Follow subd. 1 of Form No. 2.)

2. That said deceased left a last will and testament, to wit, a nuncupative will; that more than — days have elapsed since the death of said testator; that — months have not elapsed since the testamentary words were spoken by decedent; that said testamentary words (or the substance of said testamentary words) were reduced to writing within — days after they were spoken, which said writing accompanies this petition; that the estate bequeathed by said will does not exceed in value the sum of one thousand dollars;

3. That said will was made while decedent was in actual military service in the field (or doing duty on shipboard at sea), and while he was in the actual contemplation, fear, and peril of death (or in lieu of the foregoing subdivision 3, allege as follows: That said will was made while decedent was in the expectation of immediate death from an injury received on the same day on which said nuncupative will was made, published, and declared).

4. (Follow subd. 2 of Form No. 2.)

5. (Follow subd. 3 of Form No. 2.)

6. That deceased left personal property of the value of \$—.

Wherefore, petitioner prays that said will be admitted to

probate, and that letters testamentary thereon be issued to —, the person named therein as executor. —, Petitioner.
—, Attorney for Petitioner.

§ 37. [1345.] Additional Requirements. — The superior court must not receive or entertain a petition for the probate of a nuncupative will until the lapse of ten days from the death of the testator, nor must such petition at any time be acted on until the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife (if any), and all other persons resident in the state or county interested in the estate, are notified as hereinbefore provided.

Arizona. — Same, except that "fourteen" is substituted for "ten" in third line. Rev. Stats., sec. 1002.

Idaho. — Same as Arizona. Rev. Stats., sec. 5330.

Montana. — Same as Arizona. Comp. Stats., p. 284, sec. 42.

Nevada. — See Gen. Stats., sec. 3006, under last section.

Utah. — Same as California. Comp. Laws, sec. 4022.

Wyoming. — Same as California, except that the words "the court, or judge thereof in vacation," are substituted for "the superior court." Laws 1890-91, p. 251, sec. 6.

Notice. — See §§ 8, 9, *ante*; see also Cal. Code Civ. Proc., sec. 1010.

§ 38. [1346.] Nuncupative Wills. — Contests of the probate of nuncupative wills, and appointments of executors and administrators of the estate devised thereby, must be had, conducted, and made as hereinbefore provided in cases of the probate of written wills.

See §§ 11-17, 21-27, *ante*.

Arizona. — Same. Rev. Stats., sec. 1003.

Idaho. — Same. Rev. Stats., sec. 5331.

Montana. — Same. Comp. Stats., p. 284, 43.

Utah. — Same. Comp. Laws, sec. 4023.

Wyoming. — Same. Laws 1890-91, p. 251, sec. 7.

CHAPTER III.

OF EXECUTORS AND ADMINISTRATORS — THEIR LETTERS,
BONDS, REMOVALS, AND SUSPENSIONS.ARTICLE I. LETTERS TESTAMENTARY AND OF ADMINISTRATION WITH THE
WILL ANNEXED — HOW AND TO WHOM ISSUED.

II. FORM OF LETTERS.

III. LETTERS OF ADMINISTRATION — TO WHOM AND THE ORDER IN
WHICH THEY ARE GRANTED.

IV. PETITION AND CONTEST FOR LETTERS, AND ACTION THEREON.

V. REVOCATION OF LETTERS, AND PROCEEDINGS THEREFOR.

VI. OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS.

VII. SPECIAL ADMINISTRATORS, AND THEIR POWERS AND DUTIES.

VIII. WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANTED.

IX. DISQUALIFICATION OF JUDGES, AND TRANSFERS OF ADMINISTRATION.

X. REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

ARTICLE I.

LETTERS TESTAMENTARY AND OF ADMINISTRATION WITH THE WILL ANNEXED
— HOW AND TO WHOM ISSUED.

- § 39. Corporations may be executor, administrator, guardian, etc.
- § 40. To whom letters on proved will to issue.
- § 41. Who are incompetent as executors or administrators — Letters with will annexed to issue when.
- § 42. Interested parties may file objections.
- § 43. Married women.
- § 44. Executor of an executor.
- § 45. Administration while executor is absent or a minor.
- § 46. Acts of a portion of executors valid.
- § 47. Authority of administrators with will annexed — Letters, how issued.

§ 39. [1348.] **Corporations may be Executors.**—Corporations authorized by their articles of incorporation to act as executor, administrator, guardian of estates, assignee, receiver, depository, or trustee, and having a paid-up capital of not less than two hundred and fifty thousand dollars, of which one hundred thousand dollars shall have been actually paid in cash, may be appointed to act in such capacity in like manner as individuals. In all cases in which it is required that an executor, administrator, guardian, assignee, receiver, depos-

tory, or trustee shall qualify by taking and subscribing an oath, or in which an affidavit is required, it shall be a sufficient qualification by such corporation if such oath shall be taken and subscribed or such affidavit made by the president or secretary or manager thereof; and such officer shall be liable for the failure of such corporation to perform any of the duties required by law to be performed by individuals acting in like capacity, and subject to like penalties; and such corporation shall be liable for such failure to the full amount of its capital stock and upon the bond required upon its assuming the trusts provided for herein. [New section, approved March 5, 1887.]

Corporations may be executors, etc.: See notes to § 76, *post*.

§ 40. [1349.] **To Whom Letters to Issue.**—The court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors who are competent to discharge the trust, who must appear and qualify, unless objection is made as provided in section thirteen hundred and fifty-one.

See § 42, *post*.

Arizona.—Same. Rev. Stats., sec. 1004.

Idaho.—Same. Rev. Stats., sec. 5340.

Montana.—Same. Comp. Stats., p. 287, sec. 44.

Nevada.—“When any will shall have been proved and allowed, the probate court shall issue letters thereon to the persons named in the will as executors who are competent to discharge the trust, and who shall appear and qualify.” Gen. Stats., sec. 2708.

Oregon.—“When a will is proven, letters testamentary shall be issued to the persons therein named as executors, or to such of them as give notice of their acceptance of the trust and are qualified. If all the persons therein named decline to accept, or be disqualified, letters of administration with the will annexed shall be issued to the person to whom the administration would have been granted if there had been no will.” Hill’s Laws, sec. 1084.

Utah.—Same as California. Comp. Laws, sec. 4024.

Washington.—“After the probate of any will, letters testamentary shall be granted to the persons therein appointed executors. If a part of the persons thus appointed refuse to act, or be disqualified, the letters shall be granted to the other persons appointed therein. If all such persons refuse to act, letters of administration with the will annexed shall be granted to the person to whom administration would have been granted if there had been no will.” Code Proc., sec. 884.

“Every administrator with the will annexed and executor at the time letters

are granted him shall make an affidavit that he knows of no other and subsequent will of the deceased." Code Proc., sec. 895.

"In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that letters testamentary or of administration shall not be required, it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will in the manner required by existing laws; and after the probate of such will, all such estates may be managed and settled without the intervention of the court, if the said last will and testament so provides; *provided, however*, in all such cases, if the party named in such will as executor shall decline to execute the trust, or shall [die], or be otherwise disabled from any cause from acting as such executor, then letters testamentary or of administration shall issue as in other cases; *and provided further*, if the party named in the will shall fail to execute the trust faithfully, and to take care [of] and promote the interests of all parties taking under the will, then, upon petition of any creditor of such estate, or of any of the heirs, or of any person on behalf of any minor heirs, it shall be the duty of the superior court of the county wherein such estate is situated to cite such person having the management of such estate to appear before such court, and if, upon hearing of such petition, it shall appear that the trust in such will is not faithfully discharged, and that the parties interested, or any of them, have been or are about to be damaged by such acts or doings of the executor, then letters testamentary or of administration shall be had and required in such cases, and all other matters and proceedings shall be had and required as are now required in the administration of estates; and in such cases the costs of the citation and hearing shall be charged against the party failing and neglecting to execute the trust as required in such will." Code Proc., sec. 955.

Wyoming. — Same as California, except that in lieu of the words "the court" there are substituted the words "the court, judge or commissioner thereof in vacation." Laws 1890-91, p. 251, sec. 1.

Form No. 36. — Affidavit of Person Appointed Administrator with the Will Annexed or Executor to be Made at the Time Letters are Granted Him.

[Title of Court and Estate.]

State of Washington, }
 — County. } ss.

—, being first duly sworn, on his oath deposes and says that by its order duly given, made, and entered on this day, the above-entitled court has duly appointed affiant the administrator with the will annexed of the above-named estate (or, as the case may be, executor of the last will and testament of A B, deceased); that said will is dated on the — day of —, A. D. 18—, was filed in this court on the — day of —, A. D. 18—, and

was duly admitted to probate herein on the — day of —, A. D. 18—; and affiant further says that he knows of no will of said deceased other than and subsequent to the one above mentioned and described.

Subscribed and sworn to before me this — day of —, A. D. 18—. —, Clerk (or Judge) of the — Court.

Form No. 37.—Petition for Removal of Executor.

(Used in Washington only.)

[Caption, Form No. 1, § 5, *ante*.]

1. That — died on or about the — day of —, A. D. 18—, at the county of —, state of —; that at the time of his death said deceased was a resident of this county and state, and left real estate therein of about the value of \$—, and personal property of about the value of \$—;

2. That said decedent left a last will and testament, which has heretofore been duly admitted to probate in this court;

3. That one E F is named in said will as the executor thereof, and has not declined to act as such; that it is provided in said will in what manner the property of the estate of decedent shall be disposed of, and that letters testamentary or of administration shall not be required, for which reason no such letters have been issued herein;

4. That the legatees named in said will are (here insert the name, age, and residence of each legatee); that the heirs at law of deceased are as follows (here insert name, age, residence, and relationship to deceased of each heir);

5. That petitioner is one of the legatees named in said will (or is an heir at law or creditor of decedent, or is the friend or guardian of C D, one of the minor heirs at law, or legatees named in said will), and as such has an interest in the estate of said deceased;

6. That said E F has failed, and now fails, neglects, and refuses, to execute the duties of his said trust faithfully, and fails, neglects, and refuses to take care of or to promote the interests of all or any of the parties who take under said will, in this (here state wherein the failure exists);

7. That by reason of such failure to faithfully perform the duties of his trust by said E F, said legatees, heirs at law

and all persons interested in said estate have been greatly damaged, and are in danger of being further damaged, to their injury, by the said negligence of said E F;—

Wherefore petitioner prays that the said E F be cited to appear and show cause why he should not be removed from his said office of executor of said will, and that upon his removal petitioner (or A B) be appointed special administrator of said estate, with power to preserve the same until an administrator can be duly appointed herein.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 38. — Order Removing Executor.

(Only used in Washington.)

[Title of Court and Estate.]

The petition of —, praying for the removal of E F, the executor of the last will and testament of the above-named deceased, came on regularly for hearing on this day; and the court having heard the proofs, and being fully advised herein, and it appearing from such proofs that the above-named decedent died testate on the — day of —, A. D. 18—; that thereafter his last will and testament was duly admitted to probate in this court; that said E F is named therein as executor thereof; that said E F has not declined to act as such; that in said will it is provided in what manner the estate of said decedent shall be disposed of, and also it is provided therein that letters testamentary or of administration need not be issued herein; that by reason of the premises no such letters have been issued herein; and it further appearing that said E F has failed, and now fails, neglects, and refuses, to faithfully execute the duties of his trust, or to take care of or to promote the interest of any and all of the persons interested in said estate and who take under said will, and that said persons, and each of them, have been and are about to be damaged by such acts, doings, and neglect of said executor, and that the facts stated in said petition in relation thereto are true, — it is ordered that said E F be and he is hereby removed from his said trust, and the cost of these proceedings, to wit, \$—, is taxed to said executor, and he is directed to forthwith file an account of his proceedings in the matter of said estate in this

court on or before the — day of —, A. D. 18—, and therein to charge himself with said cost. And it is further ordered that — be and he is hereby appointed special administrator of said estate until the further order of this court, with power to collect and receive said estate and preserve the same.

Done in open court this — day of —, A. D. 18—.

—, Judge of the — Court.

§ 41. [1350.] Who Incompetent. — No person is competent to serve as executor who at the time the will is admitted to probate is, —

1. Under the age of majority;
2. Convicted of an infamous crime;
3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

If the sole executor or all the executors are incompetent, or renounce or fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued as designated and provided for the grant of letters in cases of intestacy.

Arizona. — Same, except that all after “issued,” in the last paragraph, is omitted. Rev. Stats., sec. 1005.

Idaho. — Same as Arizona. Rev. Stats., sec. 5341.

Montana. — Same as California, except than in subdivision 3, after the word “integrity,” there are added the words “or who is absent from or resides out of the territory,” and all after the word “issued,” in the last paragraph, is omitted. Comp. Stats., p. 287, sec. 45.

Nevada. — Same as California, except that in subdivision 3 the words “or integrity” are omitted, and all after the word “issued,” in the last paragraph, is omitted. Gen. Stats., sec. 2709.

Utah. — Same as California, except that “within thirty days after his or their appointment” is interpolated after the word “qualify.” Comp. Laws, sec. 4025.

Washington. — See Code Proc., sec. 954, under § 55, *post*.

Wyoming. — Same as California, except that after “court,” in the third subdivision, the words “judge or commissioner thereof in vacation” are inserted. Laws 1890-91, p. 351, sec. 2.

Where the lower court refused to admit a will to probate, and on appeal the supreme court directs it to be so admitted, the lower court will not be directed to issue letters of administration with the will annexed to

petitioner, unless there is a finding that he is a proper person to receive letters: *In re Wood*, 36 Cal. 75.

The judgment of the supreme court settling the right of two persons to be appointed executors of an

estate should be carried into effect by the lower court, notwithstanding the death of one of them before it acts in the matter: *In re Pacheco*, 29 Cal. 224.

A man who "lives by his wits" is not a proper person to whom to grant letters testamentary: *In re Plaisance*, Myr. Prob. 117.

Who may not be Executors: *Holliday v. Holliday*, 16 Or. 147.

The word "integrity," as used in section 1350 of the California Code of Civil Procedure, providing that no person is competent to serve as an executor or executrix who is wanting in integrity, means soundness of moral principle and character, and is synonymous with probity, honesty, and uprightness in business relations with others; and the mere fact that a person named as executrix in a will claims property as her own, which the other legatees insist belongs to the estate, does not, of itself, show a want of integrity, or disqualify her from serving as executrix, if the adverse claim is honestly made: *Estate of Bauquier*, 88 Cal. 302.

When a will is probated, the court must appoint as executor the person who is named as such in the will, if he has petitioned therefor, and is not incompetent, unless written objections have been filed, showing that the applicant is incompetent upon some one of the grounds specified in the above

section: *Estate of Bauquier*, 88 Cal. 302.

The court has no right to adjudge a person incompetent to be appointed as an executor, unless he falls within one of the classes of persons expressly declared to be incompetent by statute: *Estate of Bauquier*, 88 Cal. 302.

While the court is authorized to refuse to appoint an executor named in a will for want of integrity, yet this power should not be exercised, except upon clear and convincing evidence establishing such disqualifying fact: *Estate of Bauquier*, 88 Cal. 302.

The fact that a son of a decedent is prejudiced against his sister, who was named in the will as executrix, is not ground for holding, upon a contest between the son and the public administrator for letters of administration, that the son was thereby disqualified from acting as administrator, and that the public administrator should be appointed in preference to him: *Estate of Bauquier*, 88 Cal. 302.

Administrator with Will Annexed: See §§ 44, 47, 101, *post*.

Married Woman: See § 43, *post*.

Minor: See § 45, *post*.

Person Absent from State: See § 45, *post*.

Corporations may be Executors, etc.: See § 76, *post*.

Form No. 39.—Petition for Letters of Administration with the Will Annexed.

[Caption, Form 1, § 5, *ante*.]

The petition of —, a resident of the — county of —, state of —, respectfully shows:—

That — died on or about the — day of —, A. D. 18—, at the — county of —, state of —;

That said deceased at the time of — death was a resident of the — county of —, state of —;

That said deceased left estate in the — county of —, state of —, consisting of real and personal property;

That said personal property is of the probable value of \$—; said real property is of the probable value of \$—, and is described as follows (here insert description);

That all of said property is the separate property of decedent (or, as the case may be, is the community property of decedent and —, his widow);

That said deceased left a last will and testament, which is herewith presented to this court for probate; that petitioner is a legatee under said will, and interested in the estate of decedent;

That — is the person named as executor in said will, but renounces his right to letters testamentary (or if he is incompetent to act for any cause, so state);¹

That the names, ages, and residences of the heirs of said decedent, so far as known to your petitioner, are as follows, viz.: —, the widow of decedent, aged — years, residence —, etc.; and the names, ages, and residences of his devisees and legatees, so far as known to your petitioner, are as follows, viz.: —, aged — years, residence —, etc; —

Wherefore petitioner prays that letters of administration with the will annexed be issued to him upon said estate.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 40. — Order Appointing Administrator with the Will Annexed.

[Title of Court and Estate.]

The petition of —, one of the legatees of said deceased, praying that a document purporting to be the last will and testament of said decedent, and now on file herein, be admitted to probate, and that letters of administration with the will annexed upon the estate of said decedent coming on to be heard, and it appearing that due and legal notice of the hearing of said petition has been given; that said — died on or about the — day of —, A. D. 18—, at the county of —, state of —, leaving estate in the — county of —, in this state; that said decedent was at the time of his death a resident of the — county of —, state of —; that said document is the last will and testament of —, deceased; that it was duly executed by him in his lifetime; that the same was duly attested as required by law; that said decedent at the time of

¹ In case no one is named in the will as executor, in lieu of this allegation state "that no one is named in said will as the executor thereof."

executing said will was over the age of eighteen years, was of sound mind, and not under duress, menace, fraud, or undue influence, or in any respect incompetent to execute said will; that —, the person named in said will as executor, is dead (or renounces his right to letters testamentary; or if for any cause he is incompetent to act, or if no one was named in the will as executor, so state); that the value of the personal property of said estate is \$—; that the annual rents and profits of the realty of said estate is \$—; —

It is therefore ordered that said document be and it is hereby admitted to probate as the last will and testament of —, deceased, and that letters of administration with the will annexed upon the estate of said decedent be issued to — upon — taking the oath of office and filing a bond herein in the penal sum of \$—. —, Judge of the — Court.

Dated —, 18—.

§ 42. [1351.] Who may File Objections. — Any person interested in a will may file objections in writing to granting letters testamentary to the persons named as executors, or any of them; and the objections must be heard and determined by the court. A petition may, at the same time, be filed for letters of administration with the will annexed.

Arizona. — Same. Rev. Stats., sec. 1006.

Idaho. — Same. Rev. Stats., sec. 5342.

Montana. — Same. Comp. Stats., p. 287, sec. 46.

Nevada. — Same. Gen. Stats., sec. 2710.

Utah. — Same. Comp. Laws, sec. 4026.

Washington. — Same. Last sentence omitted. Code Proc., sec. 885.

Wyoming. — Same, except that after the word “them” these words are inserted, “for the reason stated in the next preceding section”; and after “determined” these words are inserted, “by the court, or the judge or commissioner thereof in vacation. If such objections are sustained, a petition,” in lieu of “by the court. A petition.” Laws 1890-91, p. 252, sec. 3.

Form No. 41. — Objections to Issuance of Letters to Person Appointed in the Will as Executor.

[Title of Court and Estate.]

Now comes —, one of the legatees named in the will of —, deceased, and hereby files his objection to the granting of

letters testamentary to —, the person named in said will as executor, for the following reasons, to wit: —

1. That said — is under the age of majority;
2. That said — has heretofore been convicted of an infamous crime, to wit, burglary; that said conviction was had on the — day of —, A. D. 18—, in the — court of the — county of —, in the state of —;
3. That said — is incompetent to execute the duties of the trust of executor of said will, by reason of drunkenness, im-providence, want of understanding, and want of integrity; —

Wherefore contestant respectfully prays that upon said will being probated this honorable court will decree that the application of said — for letters testamentary be denied, and will make such other and further order in the premises as may be proper.

—, Contestant.

—, Attorney of Contestant.

§ 43. [1352.] Married Woman. — A married woman may be appointed an executrix. The authority of an executrix, who was unmarried when appointed, is not extinguished nor affected by her marriage. [Amendment approved March 29, 1891; Cal. Stats. 1891, p. 136.]

Arizona. — When an unmarried woman appointed executrix marries, her authority is extinguished. When a married woman is named as executrix, she may be appointed and serve in every respect as a *feme sole*. Rev. Stats., sec. 1007.

Idaho. — Same as Arizona. Rev. Stats., sec. 5343.

Montana. — Same as Arizona. Comp. Stats., p. 288, sec. 47.

Nevada. — Same as Arizona. Gen. Stats., sec. 2711.

Utah. — Same as Arizona, except that the words "her authority is extinguished" are omitted, and the following inserted in lieu thereof, viz.: "The court or judge thereof may, upon the motion of any person interested in the estate, revoke her authority, and appoint another person in her place." Comp. Laws, sec. 4027.

Washington. — "If any executrix or administratrix marry, her husband shall not thereby acquire any interest in the effects of her testator or intestate, nor shall the administration thereby devolve on him, but the marriage shall extinguish her powers and the letters be revoked." Code Proc., sec. 889. See also Code Proc., sec. 954, under § 55 *post*.

Wyoming. — Same as Arizona. Laws 1890-91, p. 252, sec. 4.

Prior to 1891, the California section was the same as Arizona now is, and under it the following decisions were made by the supreme court of that state.

The fact that an executrix marries does not extinguish her authority so as to deprive her *instanti* of all her powers under the above section; the construction of that section, when read in connection with California Code of Civil Procedure, sections 1350, 1411, 1436, and 1437 (§§ 41, *ante*, and 91, 109, 110, *post*), and other sections of the same code, is, that the words "her authority is extinguished," as employed therein, are

the equivalent to "she ceases to be competent"; and thus becoming incompetent, may be removed under the rules provided therefor by said code. All her acts as such are valid until her removal: *Schroeder v. Superior Court*, 70 Cal. 343.

Authority of executrix ceases upon her marriage: *Teschemacher v. Thompson*, 18 Cal. 20.

Administratrix Marrying: See § 56, *post*.

§ 44. [1353.] **Administrator de Bonis non.**—No executor of an executor shall, as such, be authorized to administer on the estate of the first testator; but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed of the estate of the first testator left unadministered must be issued.

Administrator with Will Annexed: See § 47, 101, *post*, and § 41, *ante*.
Arizona.—Same. Rev. Stats., sec. 1008.

Idaho.—Same. Rev. Stats., sec. 5344.

Montana.—Same. Comp. Stats., p. 288, sec. 48.

Nevada.—Same. Gen. Stats., sec. 2712.

Oregon.—"An executor of an executor has no authority, as such, to commence or maintain an action or proceeding relating to the estate of the testator of the first executor or to take any charge or control thereof." Hill's Laws, sec. 376.

Utah.—Same as California. Comp. Laws, sec. 4028.

Washington.—"An executor of an executor has no authority, as such, to commence or maintain an action or proceeding relating to the estate of the testator of the first executor, or to take any charge or control thereof." Code Proc., sec. 709.

Wyoming.—Same as California. Laws 1890-91, p. 252, sec. 5.

The probate court has no authority to act upon an account presented by the executor of an executor against the estate of the testator of the latter: *Wetzlar v. Fitch*, 52 Cal. 638; *Bush v. Lindsey*, 44 Cal. 121.

Form No. 42.—Petition for Letters of Administration with the Will Annexed upon Estate de Bonis non.

[Title of Court and Estate.]

The petition of —, a resident of the — county of —, state of —, respectfully shows:—

That — died on or about the — day of —, A. D. 18—, leaving a will; that said will has heretofore been admitted to probate in this court;

That by the terms of said will — was appointed the executor thereof; that in pursuance thereof letters testamentary were issued to said — by the order of this court, and he duly qualified as such executor;

That said — has died (or resigned), leaving said estate unadministered upon, and it is necessary that an administrator of said estate should be appointed with said will annexed;

That the property of said estate so left unadministered is as follows:—

Personal property valued at about \$—, and real estate valued at about \$—;—

Wherefore petitioner prays that letters of administration with the will annexed be issued to him upon said estate.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 43.—Order Appointing Administrator de Bonis non with the Will Annexed.

[Title of Court and Estate.]

The petition of —, one of the legatees of —, deceased, praying for letters of administration with the will annexed upon the estate of said deceased, left unadministered, coming on to be heard, and it appearing that due and legal notice of the hearing of said petition has been given, and that —, to whom letters testamentary were heretofore issued herein, died on or about the — day of —, A. D. 18—, leaving the administration of said estate incomplete and unsettled; that the will of said decedent has been heretofore duly admitted to probate in this court, and that the value of the personal property of said estate is \$—; that the annual rents and profits of the realty of said estate is \$—; —

It is ordered that letters of administration with the will annexed upon the estate of said decedent left unadministered be issued to — upon — taking the oath of office, and filing a bond herein in the penal sum of \$—.

Dated —.

—, Judge of the — Court.

§ 45. [1854.] Administration while Executor is Absent or a Minor.—Where a person absent from the

state or a minor is named executor,—if there is another executor who accepts the trust and qualifies,—the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed must be granted; but the court may, in its discretion, revoke them on the return of the absent executor or the arrival of the minor at the age of majority.

Arizona.—Same. Rev. Stats., sec. 1009.

Idaho.—Same. Rev. Stats., sec. 5345.

Montana.—Same. Comp. Stats., p. 288, sec. 49.

Nevada.—“When a person under the age of twenty-one years shall be named executor, letters of administration with the will annexed shall be granted during the minority of the executor, unless there is another executor who shall accept the trust and qualify, in which case the executor who shall accept the trust and qualify shall have letters testamentary, and shall administer the estate until the minor shall arrive at full age, when he may be admitted as joint executor.” Gen. Stats., sec. 2713.

Oregon.—“If a person be named in a will as executor who is a non-resident of the state, or a minor, upon the removal of such disability he is entitled to qualify as such executor, if he apply therefor within thirty days from the removal of such disability, if otherwise competent. If, in the mean time, an administrator with the will annexed has been appointed, his powers and duties cease with the qualification of such executor. But if another executor has qualified and is acting as such, they thereby become joint executors.” Hill’s Laws, sec. 1090.

Utah.—Same as California. Comp. Laws, sec. 4029.

Washington.—“If the executor be a minor, or absent from the state, letters of administration with the will annexed shall be granted during the time of such minority or absence to some other person, unless there be another executor who shall accept the trust; in which case the estate shall be administered by such other executor until the disqualification shall be removed, when such minor having arrived at full age, or such absentee, shall be admitted as joint executor with the former.” Code Proc., sec. 886.

Wyoming.—Same as California. Laws 1890–91, p. 252, sec. 6.

A non-resident executor may, through an attorney, apply for and receive letters testamentary in this state, and is constructively present through the attorney by whom he applies, though actually out of the state when the application and order for the issuance of letters is made; but he must come into the state within a reasonable time, and personally submit himself to the jurisdiction of the court,

and personally conduct the settlement of the estate: *In re Brown*, 80 Cal. 381.

Definition of Term “Absent,” etc.—Section 1354 of the California Code of Civil Procedure, in using the words “a person absent from the state,” in providing for letters testamentary to a co-executor, or letters of administration with the will annexed if there is no other executor,

which may be revoked upon the return of the absentee, is construed to mean a person both actually and constructively absent from the state, who has made no application for letters: *In re Brown*, 80 Cal. 381.

§ 46. [1355.] Acts of Portion of Executors Valid.

— When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust required by the will as effectually for every purpose as if all were appointed, and should act together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state, or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority, in writing, to act for both; and where there are more than two executors or administrators, the act of a majority is valid.

Arizona. — Same. Rev. Stats., sec. 1010.

Idaho. — Same. Rev. Stats., sec. 5346.

Montana. — Same. Comp. Stats., p. 288, sec. 50.

Nevada. — Same, except that authority must be “under seal, to act for one or for both.” Gen. Stats., sec. 2714.

Utah. — The words of the sections are the same, but in Utah the punctuation between the words “administrators” and “the act” is a period instead of a comma, as above. Comp. Laws, sec. 4030.

Washington. — Same as California, to and including the word “together”; balance omitted. Code Proc., sec. 892.

Wyoming. — Same as California. Laws 1890-91, p. 252, sec. 7.

Executors’ Powers: See §§ 103, 224, 458, *post*; and see § 100, *post*, as to death, lunacy, conviction of crime, etc.

Foreign Executor: Cal. Code Civ. Proc., sec. 1913.

Revocation of Probate, Effect of: See §§ 66-69, *post*.

Removals and Suspensions: See §§ 109-113, *post*.

One of two executors absent, the other may act: *Wheeler v. Bolton*, 54 Cal. 302.

In case administration be by more than one executor, each one is equally entitled to the possession of the estate; and where, without the agency of one executor the property of the estate passes into the possession

of another, and becomes lost to the estate, he is not chargeable who had not the possession of the portion thus lost: *Abila v. Burnett*, 33 Cal. 658.

An agreement of the heirs not to sue one executor does not release his co-executor, under the circumstances of this case: *In re Sanderson*, 74 Cal. 199.

§ 47. [1356.] **Authority — Letters.** — Administrators with the will annexed have the same authority over the estates which executors named in the will would have, and their acts are as effectual for all purposes. Their letters must be signed by the clerk of the court, and bear the seal thereof.

Administrator with Will Annexed: See §§ 41, *ante*, and 101, *post*.

Arizona. — Same. Rev. Stats., sec. 1011.

Idaho. — Same. Rev. Stats., sec. 5347.

Montana. — Same. Comp. Stats., p. 288, sec. 51.

Nevada. — Same. Gen. Stats., sec. 2715, 2716.

Utah. — Same. Comp. Laws, sec. 4031.

Washington. — Same. Code Proc., secs. 893, 894.

Wyoming. — Same. Laws 1890-91, p. 252, sec. 8.

See notes to § 46, *ante*.

The order of appointment pre- administrators with the will annexed.
scribed by § 51, *post*, need not be That order applies only in cases of in-
followed by the court in appointing testacy: *In re Barton*, 52 Cal. 538.

ARTICLE II.

FORM OF LETTERS.

§ 48. Form of letters testamentary.

§ 49. Form of letters of administration with the will annexed.

§ 50. Form of letters of administration.

§ 48. [1360.] **Letters Testamentary.** — Letters testamentary must be substantially in the following form: State of California, county (or city and county) of ——. The last will of A B, deceased, a copy of which is hereto annexed, having been proved and recorded in the superior court of the county (or city and county) of —, C D, who is named therein as such, is hereby appointed executor. Witness: G H, clerk of the superior court of the county (or city and county) of —, with the seal of the court affixed, the — day of —, A. D. 18—. (Seal.) By order of the court, G H, clerk.

Arizona. — Same. Rev. Stats., sec. 1012.

Idaho. — Same. Rev. Stats., sec. 5348.

Montana. — Same. Comp. Stats., p. 288, sec. 52.

Nevada. — Same. Gen. Stats., sec. 2717.

Oregon. — "Letters testamentary may be in the following form: State of Oregon, county of —, ss. To all persons to whom these presents shall come, greeting: Know ye, that the will of —, deceased, a copy of which is hereto annexed, has been duly proven in the county court for the county aforesaid, and that —, who is named executor therein, has been duly appointed such executor by the court aforesaid; this, therefore, authorizes the said — to administer the estate of the said —, deceased, according to law. In testimony whereof, I, —, clerk of the county court, have hereunto subscribed my name and affixed the seal of said court, this — day of —, A. D. 18—. [L. S.] A B, clerk county court." Hill's Laws, sec. 1109.

Utah. — Same as California. Comp. Laws, sec. 4032.

Washington. — "Letters testamentary to be issued to executors under the provisions of this act may be in the following form: State of Washington, County of ——. In the superior court of the county of ——. Whereas, the last will of A B, deceased, was, on the — day of —, A. D. 18—, duly exhibited, proven, and recorded in our said superior court, a copy of which is hereto annexed; and whereas, it appears in and by said will that C D is appointed executor thereon, — now, therefore, know all men by these presents, that we do hereby authorize the said C D to execute said will according to law. Witness my hand and the seal of said court this — day of —, A. D. 18—." Code Proc., sec. 898.

Wyoming. — Same as California, except that "superior court of" is changed to "district court within and for," and the attestation is as follows: "Witness, G H, clerk of the district court of the — district within and for the county of —, with the seal of the court affixed, the — day of —, A. D. 18—. G H, Clerk." Laws 1890-91, p. 253, sec. 1.

Seal: Cal. Code Civ. Proc., sec. 152. See also note to § 50, *post*.

§ 49. [1361.] Letters of Administration with the Will Annexed. — Letters of administration with the will annexed must be substantially in the following form: State of California, county (or city and county) of ——. The last will of A B, deceased, a copy of which is hereto annexed, having been proved and recorded in the superior court of the county (or city and county) of —, and there being no executor named in the will (or as the case may be), C D is hereby appointed administrator with the will annexed. Witness: G H, clerk of the superior court of the county (or city and county) of —, with the seal of the court affixed, the — day of —, A. D. 18—. (Seal.) By order of the court, G H, clerk.

Arizona. — Same. Rev. Stats., sec. 1013.

Idaho. — Same. Rev. Stats., sec. 5349.

Montana. — Same. Comp. Stats., p. 289, sec. 53.

Nevada. — Same. Gen. Stats., sec. 2718.

Oregon. — "Letters of administration may be in the following form: State of Oregon, county of —, ss. To all persons to whom these presents shall come, greeting: Know ye, that it appearing to the court aforesaid, that — has died intestate, leaving at the time of his death property in this state, such court has duly appointed — administrator of the estate of such —; this, therefore, authorizes the said — to administer the estate of the said —, deceased, according to law. In testimony whereof, etc., the same as in letters testamentary. Letters to an administrator of the partnership with the will annexed, or to a special administrator, may be issued according to the

foregoing forms, with such variations as may be proper in the particular case." Hill's Laws, sec. 1110.

Utah. — Same as California. Comp. Laws, sec. 4033.

Washington. — "Letters of administration with the will annexed may be substantially in the following form: State of Washington, county of ——. In the superior court of the county of ——. The last will of A B, deceased, a copy of which is hereunto annexed, having been proved and recorded in the said superior court, and (as the case may be), C D is hereby appointed administrator with the will annexed. Witness my hand and the seal of said court this — day of —, A. D. 18—." Code Proc., sec. 899.

Wyoming. — Same as California, with the changes noted under last section. Laws 1890-91, p. 253, sec. 2.

Seal: Cal. Code Civ. Proc., sec. 152. See note to next section.

§ 50. [1362.] Letters of Administration. — Letters of administration must be signed by the clerk, under the seal of the court, and substantially in the following form: State of California, county (or city and county) of ——. C D is hereby appointed administrator of the estate of A B, deceased. (Seal.) Witness: G H, clerk of the superior court of the county (or city and county) of —, with the seal thereof affixed, the — day of —, A. D. 18—. By order of the court, G H, clerk.

Arizona. — Same. Rev. Stats., sec. 1014.

Idaho. — Same. Rev. Stats., sec. 5350.

Montana. — Same. Comp. Stats., p. 289, sec. 54.

Nevada. — Same. Gen. Stats., sec. 2738.

Oregon. — See Hill's Laws, sec. 1110, under last section.

Utah. — Same as California. Comp. Laws, sec. 4034.

Washington. — "Letters of administration shall be signed by the clerk, and be under the seal of the court, and may be substantially in the following form: State of Washington, county of ——. Whereas, A B, late of —, on or about the — day of —, A. D. 18—, died intestate, leaving at the time of his death property in this state subject to administration, — now, therefore, know all men by these presents, that we do hereby appoint — administrator upon said estate, and hereby authorize him to administer the same according to law. Witness my hand and the seal of said court this — day of —, A. D. 18—." Code Proc., sec. 904.

Wyoming. — Same as California, with the changes noted under § 48. Laws 1890-91, p. 253, sec. 3.

Seal: Cal. Code Civ. Proc., sec. 152.

The seal of court to letters of administration need not be affixed at the particular place indicated by the form provided in the above section; an impression of it upon the paper upon which the letters are written is a substantial compliance: *Sharp v. Dye*, 64 Cal. 9.

Letters of administration dated and issued by the clerk on Christmas day are not void: *Glendenning v. McNutt*, 1 Idaho, 592.

The private seal of a probate judge adopted as a seal of a probate court is entitled to full credit as such: *Ward v. Moorey*, 1 Wash. Ter. 104.

ARTICLE III.

LETTERS OF ADMINISTRATION, TO WHOM AND THE ORDER IN WHICH THEY ARE GRANTED.

- § 51. Order of persons entitled to administer — Partner not to administer.
- § 52. Preference of persons equally entitled.
- § 53. In discretion of court to appoint administrator when.
- § 54. When minor entitled, who appointed administrator.
- § 55. Who are incompetent to act as administrators.
- § 56. Married woman.

§ 51. [1365.] Persons Entitled to Administer. — Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof, and they are respectively entitled thereto in the following order: —

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed;
2. The children;
3. The father or mother;
4. The brothers;
5. The sisters;
6. The grandchildren;
7. The next of kin entitled to share in the distribution of the estate;
8. Public administrator;
9. The creditors;
10. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate.

Arizona. — Same, except that the following is omitted: "The relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof." Also, "8. Public administrator" omitted. Rev. Stats., sec. 1015.

Idaho. — Same as Arizona, except that the eighth in order is: "Any of the kindred," followed by "9. The public administrator." Rev. Stats., sec. 5351.

Montana. — Same as California, except that the following is added: "And provided further, that no person who is not a resident of this territory shall be appointed administrator. It is further provided that if no petition for letters of administration be made on or before the first day of the second term of the probate court after the death of the decedent, by some one as mentioned in this section, the probate judge shall issue letters of administration to the public administrator, who shall proceed to administer said estate." Comp. Stats., p. 289, sec. 55.

Nevada. — Same as California, except that "any person or persons legally competent" is placed eleventh in order, and "any of the kindred, not above enumerated, within the fourth degree of consanguinity," is placed tenth in order. Gen. Stats., sec. 2719.

Oregon. — "Administration of the estate of an intestate shall be granted by the county court authorized to take proof of a will, as prescribed in section 1083, in case such intestate had made a will. Administration shall be granted and letters thereof issued as follows: 1. To the widow or next of kin, or both, in the discretion of the court; 2. To one or more of the principal creditors; or 3. To any other person competent and qualified whom the court may select." Hill's Laws, sec. 1085. (For section 1083, Hill's Laws, see § 1, *ante*.)

"The persons named in the subdivisions of the last section, if qualified and competent for the trust, shall be entitled to the administration in the order therein named. If those named in subdivision 1 do not apply for the administration within thirty days from the decease of the intestate, they shall be deemed to have renounced their right thereto; but the court, or judge thereof, in its discretion, may, if they reside within the county, direct that a citation issue to them, requiring them within such period to apply for or renounce their right of administration; and if the persons named in subdivision 2 do not make such application within forty days from such decease, they shall be deemed to have renounced their right to the administration also." Hill's Laws, sec. 1086.

"If the deceased were a married woman, the administration of her estate shall in all cases be granted to her husband, if he be qualified and competent for the trust, and apply therefor within thirty days from her decease, unless by force of a marriage settlement, or otherwise, she shall have made some testamentary disposition of her property which shall render it necessary and proper to grant the administration to some other person." Hill's Laws, sec. 1087. See Hill's Laws, sec. 1092, under § 5, *ante*.

"After the inventory is taken, the partnership property shall be in the custody and control of the executor or administrator, for the purposes of administration, unless the surviving partner shall, within five days from the filing of the inventory, or such further time as the court or judge may allow, apply for the administration thereof, and give the undertaking therefor hereinafter prescribed." Hill's Laws, sec. 1102.

"If the surviving partner apply therefor, as provided in the last section, he

is entitled to the administration of the partnership estate, if he have the qualifications and competency required for a general administrator. He is denominated an administrator of the partnership, and his powers and duties extend to the settlement of the partnership business generally, and the payment or transfer of the interest of the deceased in the partnership property remaining after the payment or satisfaction of the debts and liabilities of the partnership, to the executor or general administrator within six months from the date of his appointment, or such further time, if necessary, as the court or judge may allow. In the exercise of his powers and the performance of his duties, the administrator of the partnership is subject to the same limitations and liabilities and control and jurisdiction of the court as a general administrator." Hill's Laws, sec. 1103.

Utah. — Same as California, except that "brothers or sisters" are placed together in subdivision 4, and "public administrator" is omitted from the list. Comp. Laws, sec. 4035.

Washington. — "Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order: —

"1. The surviving husband or wife, or such person as he or she may request to have appointed.

"2. The next of kin, in the following order: 1. Child or children; 2. Father or mother; 3. Brothers or sisters; 4. Grandchildren.

"3. To one or more of the principal creditors; *provided*, that if the persons so entitled or interested shall neglect for more than forty days after the death of the intestate to present a petition for letters of administration, or if there be no relatives, or next of kin, or if the heirs, or one or more of the principal creditors, in writing, waive their right to administration, or if there be no principal creditor or creditors, then the court or judge may appoint any suitable and competent person to administer such estate." Code Proc., sec. 900.

Wyoming. — Same as California, except that the "public administrator" is omitted; and at the end of the section these words are added: "If he be competent only by reason of paragraphs 8 and 9, above set forth" (8 and 9 are the same as 9 and 10 in the California, § 51, *supra*). Laws 1890-91, p. 253, 254, sec. 1.

One does not die intestate, within the meaning of the above section, who has left an instrument in writing which is entitled to be probated as a will: *In re Barton*, 52 Cal. 538.

Where a person does not die intestate, the court in appointing an administrator with the will annexed is limited to the order of preference prescribed in this section: *In re Barton*, 52 Cal. 538.

"The next of kin entitled to share in the distribution of the estate" means the next of kin capable of inheriting, or who would be

entitled to distribution if there was no nearer kindred: *Anderson v. Potter*, 5 Cal. 64.

A stranger is legally competent to act as administrator: *In re Kirtlan*, 16 Cal. 161.

Recognition by the court of a person as administrator, when he has not qualified and received letters, does not make him administrator *de facto*: *Pryor v. Downey*, 50 Cal. 388.

An adjudication against an applicant for letters of administration in a contest of his right upon the ground of illegitimacy is an estoppel

as to his prior right, but does not preclude his appointment in case the successful applicant is removed: *In re Pico*, 56 Cal. 413.

An illegitimate child is not entitled to administer on the estate of his father as against a brother of the father: *In re Pico*, 52 Cal. 84.

A recital in will, "A B, my adopted son," is *prima facie* evidence of such relationship, so as to entitle him to letters of administration: *In re Keenan*, Myr. Prob. 186.

United States shipping commissioner is not entitled to letters of administration on effects on shore of deceased sailor: *In re Bedford*, Myr. Prob. 60.

Surviving partner cannot administer upon the estate of a deceased partner, even though he be his brother: *Cornell v. Gallagher*, 16 Cal. 367.

One who had formerly been a partner, and between whom and the deceased there are unsettled partnership matters, is ineligible to be appointed administrator of decedent's estate: *In re Garber*, 74 Cal. 338.

Letters of administration are void if issued to a person other than the one named in the order directing their issuance: *In re Frey*, 52 Cal. 658.

The public administrator is preferred to creditors: *In re McKinnon*, 64 Cal. 226; *In re Hyde*, 64 Cal. 228.

A public administrator who applies for letters in his individual capacity as a creditor of deceased does not waive his right to make a subsequent application in his official capacity: *In re McKinnon*, 64 Cal. 226.

Prior to the amendments of 1876, the creditors stood eighth, and the public administrator ninth, in this section. Where a creditor petitioned for letters of administration, and other creditors requested in writing the issuance of letters to the public administrator, it was held to be within the discretionary power of the court to appoint the latter: *In re Doak*, 46 Cal. 573.

The public administrator has a right to administer only in cases of intestacy; the court may exercise its discretion in appointing him, where there is a will: *In re Nunan*, Myr. Prob. 238.

Nominee of non-resident widow is entitled to letters of administration in preference to the public administrator: *In re Cotter*, Myr. Prob. 179; affirmed 54 Cal. 215; *In re Robie*, Myr. Prob. 226.

A non-resident person cannot nominate a person to serve as administrator, nor is he competent himself, under the above section, to serve as such: *In re Beach*, 63 Cal. 458; *In re Hyde*, 64 Cal. 228. See also *In re Cotter*, 54 Cal. 217; *In re Kelly*, 57 Cal. 81; *In re Morgan*, 53 Cal. 245.

The nominee of a foreign executor is not entitled to letters of administration as against one entitled to such letters under the code: *In re Garber*, 74 Cal. 338.

A non-resident executor cannot nominate an administrator: *In re Murphy*, Myr. Prob. 185.

The court may exercise its discretion in appointing the nominee of the grandmother of an unmarried deceased minor in preference to a creditor, when she is the sole heir: *In re Wyche*, Myr. Prob. 85.

Section 1369 of the California Code of Civil Procedure (§ 55, *post*), which renders a non-resident surviving wife incompetent to serve as the administratrix of her husband's estate, does not take away the right to nominate the administrator given her by the above section, and the latter section in no respect conflicts with § 66, *post*, as to revoking letters of administration: *In re Stevenson*, 72 Cal. 164.

When decedent has a deposit not exceeding the sum of three hundred dollars in any savings bank, the surviving spouse, or if there is no surviving spouse, then the next of kin, may, without procuring letters of administration, withdraw said deposit upon filing an affidavit with said bank showing that the depositor is dead; that affiant is the surviving spouse, or that there is no surviving spouse, and that affiant is the next of kin, etc.; that the whole amount that decedent left on deposit in any or all banks in this state does not exceed the said sum of three hundred dollars: Cal. Stats. 1873-74, p. 132.

Community property not subject to administration on the death of wife: *Packard v. Arellanes*, 17 Cal. 536.

The granting of administration out of the order provided in section 1085 of the Oregon code, *supra*, would be erroneous, but not a nullity. The persons entitled to precedence could only take advantage of the error by applying for the appointment within the time specified in said section, otherwise they waive their right: *Ramp v. McDaniel*, 12 Or. 108.

Where a wife dies, leaving a husband surviving, but no issue, father, mother, brother, or sister, the surviv-

ing husband is entitled to succeed to the whole estate, and a nephew of the wife, not being entitled to succeed to any portion of the estate, is not entitled to letters of administration: *In re Carmody*, 88 Cal. 616.

Corporations may be administrators, etc.: See, § 76 *post*.

Administrator of a partnership cannot partition real property, nor can the county court confer such power upon him: *Burnside v. Savier*, 6 Or. 154.

Incompetent Persons: See §§ 55, 56, *post*.

Public Administrator: See §§ 334 et seq., *post*.

Recommendation in Writing by One Entitled to Administer: See § 65, *post*.

§ 52. [1366.] Preference of Persons Entitled.—Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood.

Arizona.—Same. Rev. Stats., sec. 1016.

Idaho.—Same. Rev. Stats., sec. 5352.

Montana.—Same. Comp. Stats., p. 290, sec. 56.

Nevada.—Same. Gen. Stats., sec. 2720.

Utah.—Same as California, except that "males must be preferred to females" is omitted. Comp. Laws, sec. 4036.

, § 53. [1367.] Discretion of Court to Appoint.—When there are several persons equally entitled to the administration, the court may grant letters to one or more of them; and when a creditor is claiming letters, the court may, in its discretion, at the request of another creditor, grant letters to any other person legally competent.

Arizona.—Same. Rev. Stats., 1017.

Idaho.—Same. Rev. Stats., sec. 5353.

Montana.—Same. Comp. Stats., p. 290, sec. 57.

Nevada.—Same as California to the word "and"; balance omitted. Gen. Stats., sec. 2721.

Utah.—Same as California. Comp. Laws, sec. 4037.

Wyoming.—Same as California, except that the judge or commissioner of the court may, in vacation, also act. Laws 1890-91, p. 254, sec. 2.

Where one creditor petitions to be appointed administrator, and other creditors petition for the appointment of the public administrator, it is within the discretion of the court

to appoint either: *In re Doak*, 46 Cal. 573.

The acts of one administrator are deemed the acts of all: *Willis v. Farley*, 24 Cal. 501; § 46, *ante*.

§ 54. [1368.] **Minor Entitled, Who Appointed.** — If any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court.

Arizona. — Same. Rev. Stats., sec. 1018.

Idaho. — Same. Rev. Stats., sec. 5354.

Montana. — Same. Comp. Stats., p. 290, sec. 58.

Nevada. — "If any person entitled to administration shall be a minor, administration shall be granted to his or her guardian." Gen. Stats., sec. 2724.

Utah. — Same as California. Comp. Law, sec. 4038.

§ 55. [1369.] **Who are Incompetent.** — No person is competent or entitled to serve as administrator or administratrix who is, —

1. Under the age of majority;
2. Not a *bona fide* resident of the state;
3. Convicted of an infamous crime;
4. Adjudged by the court incompetent to execute the duties of the trust, by reason of drunkenness, improvidence, or want of understanding or integrity.

Arizona. — Same, except that the phrase "not a *bona fide* resident of the state" is omitted. Rev. Stats., sec. 1019.

Idaho. — Same. Rev. Stats., sec. 5355.

Montana. — Same as Arizona. Comp. Stats., p. 290, sec. 59.

Nevada. — Same as Arizona. Gen. Stats., sec. 2722.

Oregon. — "The following persons are not qualified to act as executors or administrators: Non-residents of this state; minors; judicial officers, other than justices of the peace; persons of unsound mind, or who have been convicted of any felony, or of a misdemeanor involving moral turpitude; or a married woman." Hill's Laws, sec. 1108.

Utah. — Same as California. Comp. Law, sec. 4039.

Washington. — "The following persons are not qualified to act as executors or administrators: Non-residents of this state; minors; judicial officers, other than justices of the peace; persons of unsound mind, or who have been convicted of any felony, or of a misdemeanor involving moral turpitude; or a married woman; and when any person to whom letters testamentary or of administration have been issued becomes disqualified to act because of leaving the state, becoming of unsound mind, or is convicted of any crime, or misdemeanor involving moral turpitude, or if a woman, and she ceases to be single, the court having jurisdiction shall revoke his or her letters as in this act provided." Code Proc., sec. 954.

Wyoming. — Same as California, except that, in the last sentence, after the word "court," these words are inserted: "Judge or commissioner thereof in vacation." Laws 1890-91, p. 254, sec. 3.

Revoking Letters: See § 66, *post*. Cal. Code Civ. Proc., sec. 1379 (see § 65, *post*), does not repeal this section: *In re Beach*, 63 Cal. 458.

See conflict between subdivision 2 of above section and the last clause of Cal. Code Civ. Proc., sec. 1379 (§ 65, *post*). See also note to said section.

Power of court to remove administrator for neglect, mismanagement, and incompetency is not abridged by section 1379 (§ 65, *post*) of the Code of Civil Procedure: *In re Pico*, 56 Cal. 413.

The court has no discretion to exclude a person except for some of the causes specified in the above section: *In re Pacheco*, 23 Cal. 480.

Great age and inability to read, write, or speak English do not show any want of understanding: *In re Pacheco*, 23 Cal. 481.

The fact that the surviving

husband claims the whole estate of the deceased wife as his own does not show a want of integrity, or disqualify him to act as her administrator: *In re Carmody*, 88 Cal. 616.

There is no presumption that an applicant for letters of administration would be biased in favor of his son who claims a large indebtedness against the estate that would disqualify said applicant upon the ground of want of integrity: *Root v. Davis*, 10 Mont. 228.

No person is incompetent by reason of intemperance, want of understanding or integrity, who for several years preceding his petition for letters of administration has so conducted his business and the business of others as to acquire the reputation of being a conservative, clear-headed, and successful business man: *Root v. Davis*, 10 Mont. 228.

§ 56. [1370.] Married Woman as Administratrix.

—A married woman may be appointed administratrix. When an unmarried woman appointed administratrix marries, her authority is not extinguished. [Amended February 24, 1891; Stats. 1891, p. 11.]

Arizona. — “A married woman must not be appointed administratrix. When an unmarried woman appointed administratrix marries, her authority is extinguished.” Rev. Stats., sec. 1020.

Idaho. — Same as Arizona. Rev. Stats., sec. 5356.

Montana. — “A married woman may be an executrix, administratrix, guardian, or trustee, and may bind herself and the estate she represents without any act or assent on the part of her husband.” Comp. Stats., p. 290, sec. 60. (See § 44, *ante*.)

Nevada. — “When any unmarried woman who shall have been appointed administratrix shall marry, her marriage shall extinguish her authority.” Gen. Stats., sec. 2723.

Oregon. — “The following persons are not qualified to act as executors or administrators: . . . or a married woman.” Hill’s Laws, sec. 1108.

Utah. — “When objection is made by any person interested in an estate, a married woman must not be appointed administratrix. When an unmarried woman appointed administratrix marries, the court or judge thereof may, upon the motion of any such interested person, revoke her authority and appoint another person in her place.” Comp. Laws, sec. 4040.

Washington. — See Code Proc., sec. 954, under last section.

Wyoming. — Same as Arizona. Laws 1890-91, p. 254, sec. 4.

The marriage of an administratrix extinguishes her authority, but does not deprive her of the right to retain possession of the property of the estate until her successor is appointed, or until otherwise ordered by the court; and where an action was pending

against her in replevin, it was held that her possession, having been lawful, will be presumed to continue lawful after her marriage, especially as against a wrong-doer: *Buckley v. Buckley*, 16 Nev. 180.

ARTICLE IV.

PETITION FOR LETTERS, AND ACTION THEREON.

- § 57. Applications, how made.
- § 58. When granted.
- § 59. Notice of application.
- § 60. Contesting applications.
- § 61. Hearing of application.
- § 62. Evidence of notice.
- § 63. Grant to any applicant.
- § 64. What proofs must be made before granting letters of administration.
- § 65. Letters may be granted to others than those entitled.

§ 57. [1871.] **Application, how Made.**—Petitions for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages, and residence of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterwards proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments.

Arizona.—Same. Rev. Stats., sec. 1021.

Idaho.—Same. Rev. Stats., sec. 5357.

Montana.—Same. Comp. Stats., p. 290, sec. 61.

Nevada.—Same. Gen. Stats., sec. 2725.

Oregon.—“In an application to prove a will, or for the appointment of an executor or administrator, the petition shall set forth the facts necessary to give the court jurisdiction, and also state whether the deceased left a will or not, and the names, age, and residence, so far as known, of his heirs.” Hill’s Laws, sec. 1092.

Utah.—Same as California. Comp. Laws, sec. 4041.

Washington.—“Application for letters of administration shall be made by petition in writing, signed by the applicant or his attorney, and filed in the superior court, which petition shall set forth the facts essential to giving the

court jurisdiction of the case, and such applicant, at the time of making such application, shall make an affidavit, stating, to the best of his knowledge and belief, the names and places of residence of the heirs of the deceased, and that the deceased died without a will." Code Proc., sec. 901.

"A similar affidavit, with such variations as the case may require, shall be made by administrators of the goods remaining unadministered, and by administrators during the time of a contest about a will or the granting of letters of administration." Code Proc., sec. 902.

Wyoming.—Same as California, except that after the first sentence these words are added: "and where the same is situated." Laws 1890-91, p. 254, sec. 5.

Where a petition for letters of administration is addressed "to the honorable the judge of the probate court of the county of Santa Clara," and goes on: "The petition of M. S., of Monterey, etc., shows that Dr. T., late a resident of the county aforesaid, died in said county," etc., held, that the word "aforesaid" refers to the county named, to wit, "Santa Clara," and not "Monterey," and hence that the petition sufficiently shows that Dr. T. at the time of his death was a resident of Santa Clara County: *Townsend v. Gordon*, 19 Cal. 188, 189.

The amount and value of an estate are not jurisdictional facts in an application for letters of administration: *Lucas v. Todd*, 28 Cal. 182.

A petition for letters of administration is sufficient if it shows that the petitioner is one of the persons entitled to administer: *Lucas v. Todd*, 28 Cal. 182.

It is not requisite that the prop-

erty of the estate be described in a petition for letters of administration; it is only required that the value and character of the property, when known to the applicant, should be stated: *Duff v. Duff*, 71 Cal. 513.

Petition for letters of administration will be denied where the real object of the application is to clothe a person with the trust, so as to make him defendant in an action to quiet title: *In re Murray*, Myr. Prob. 208.

The fact that it is provided that application for letters must be made by widow within thirty days after decease does not necessarily imply that she could not be appointed after that period as administrator of her husband's estate: *Ramp v. McDaniel*, 12 Or. 108.

Orders and decrees need not recite the facts upon which they are based: See § 314, *post*.

Form No. 44.—Petition for Letters of Administration.

[Caption, Form 1, § 5; *ante*.]

The petition of —, a resident of the — county of —, state of —, respectfully shows:—

1. That — died on or about the — day of —, 18—, at the county of —, state of —;
2. That said deceased, at the time of — death, was a resident of the — county of —, state of —;
3. That said deceased left estate in the county of —, state of —, consisting of real and personal property;
4. That said personal property is of the probable value of \$—; said real estate is of the probable value of \$—; and

is described as follows (here insert description; and in the state of Washington state location of all property);

5. That the heirs at law of said deceased are (here insert the names and relationship);

6. That due search and inquiry have been made to ascertain if said deceased left a will and testament, but none has been found;

7. That your petitioner is a — of said deceased, and is entitled to letters of administration of said estate; —¹

Wherefore petitioner prays that letters of administration of said estate be issued to your petitioner.

—, Petitioner.

—, Attorney for Petitioner.

§ 58. [1372.] When Granted.—Letters of administration may be granted by the court at any time appointed for the hearing of the application, or at any time to which the hearing is continued or postponed.

Arizona.—“Letters of administration may be granted at a regular term of the court, or at a special term appointed by the judge for the hearing of the application.” Rev. Stats., sec. 1022.

Idado.—Same as Arizona. Rev. Stats., sec. 5358.

Montana.—Same as Arizona. Comp. Stats., p. 291, sec. 62.

Nevada.—Same as Arizona, except that letters may also be granted at chambers. Gen. Stats., sec. 2726.

Oregon.—See Hill's Code, secs. 903, 904, under § 1, *ante*.

Utah.—Same as California. Comp. Laws, sec. 4042.

Washington.—See Code Proc., sec. 847, under § 1, *ante*.

Wyoming.—Same as California. Laws 1890-91, p. 255, sec. 6.

While one administrator of an estate is in office, there is no power in the probate judge or court to appoint a new one: *In re Hamilton*, 34 Cal. 464; *Haynes v. Meeks*, 20 Cal. 288.

When letters testamentary are ordered issued to one person, if they are issued to a different person they are void: *In re Frey*, 52 Cal. 661.

The same rule applies to special

administrators: *In re Crozier*, 65 Cal. 332.

Form No. 45.—Petition for the Issuance of Letters of Administration to Others than Those Entitled.

[Caption, Form 1, § 5, *ante*.]

1. (Follow subd. 1 of Form No. 44, § 57, *ante*.)

¹ If the petition is by the public administrator, in lieu of this allegation insert the following: “That your petitioner is the public administrator of said — county of —, and is entitled to letters of administration of said estate.”

2. (Follow subd. 2 of Form No. 44, § 57, *ante*.)

3. (Follow subd. 3 of Form No. 44, § 57, *ante*.)

4. (Follow subd. 4 of Form No. 44, § 57, *ante*.)

5. (Follow subd. 5 of Form No. 44, § 57, *ante*.)

6. (Follow subd. 6 of Form No. 44, § 57, *ante*.)

7. That — is the son (widow, etc., as the case may be) of said deceased, but does not wish to act as administrator of the estate of said deceased, and has requested, in writing, that petitioner be appointed in his stead as such administrator, which said request is annexed hereto and made a part hereof;—

Prayer.— (Follow prayer of Form No. 44.)

NOTE.— Form of written request is No. 49, under § 65, *post*.

§ 59. [1373.] Notice of Application.—When a petition praying for letters of administration is filed, the clerk must give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing.

Arizona.—Same. Rev. Stats., sec. 1023.

Idaho.—Same. Rev. Stats., sec. 5359.

Montana.—Same. Comp. Stats., p. 291, sec. 63.

Nevada.—Same. Gen. Stats., sec. 2727. See also § 8, *ante*.

Utah.—Same. Comp. Laws, sec. 4043.

Washington.—Same. Code Proc., sec. 903.

Wyoming.—“When a petition praying for letters of administration is filed in vacation of the court, the clerk shall give notice to the judge and court commissioner of the county where the same is filed of the filing of such petition, and no letters shall be issued until a period of not less than ten days has elapsed from the time of filing the petition, when, if not otherwise ordered by the judge or court, the court commissioner may proceed to act on the petition.” Laws 1890-91, p. 255, sec. 7.

Publication of Notice: See § 315, *post*.

A failure to give the requisite notice of the hearing of a petition for letters of administration is fatal to the jurisdiction: *Beckett v. Selover*, 7 Cal. 233-237.

No other notice of an application for letters of administration than

that prescribed by statute is required. Where the public administrator of one county applies for letters, it is not necessary to send notices to the public administrator of any other county: *In re Griffith*, 84 Cal. 107.

Form No. 46.—Notice of Hearing of Petition for Letters of Administration.

State of —, }
 County of —. } In the — Court.

Notice is hereby given that — has filed in this court — petition, praying for letters of administration upon the estate of —, deceased, and that the same will be heard on Friday the — day of —, 18—, at ten o'clock in the forenoon of said day, at the court-room of said court, in the — county of —; and all persons interested in said estate are notified then and there to appear and show cause, if any they have, why the prayer of said petitioner should not be granted.

—, Clerk.

By —, Deputy Clerk.

NOTE. — Proof of posting of the above notice same as Form No. 9, *ante*.

§ 60. [1874.] Contesting Application. — Any person interested may contest the petition, by filing written opposition thereto, on the ground of the incompetency of the applicant, or may assert his own rights to the administration, and pray that letters be issued to himself. In the latter case the contestant must file a petition and give the notice required for an original petition, and the court must hear the two petitions together

Arizona. — Same. Rev. Stats., sec. 1024.

Idaho. — Same. Rev. Stats., sec. 5360.

Montana. — Same. Comp. Stats., p. 291, sec. 64.

Nevada. — Same, except that provision as to hearing petitions together is omitted. Gen. Stats., sec. 2728.

Utah. — Same as California. Comp. Laws, sec. 4044.

Wyoming. — Same as California to end of first sentence, and then as follows: "In the latter case the contestant must file a petition, and must submit evidence in support thereof, taken and reduced to writing before the clerk or commissioner of said court, and the court or judge must hear the two petitions together." Laws 1890-91, p. 255, sec. 8.

Sections 15 to 21, *ante*, apply only to proceedings in contests against the probate of wills in which the contestant is plaintiff and the petitioner is defendant, and do not apply to applications for letters of

administration. In the latter case, the grounds of opposition to the petition which are filed by the administrator are nothing more than an answer to which no replication is required: *In re Wooten*, 56 Cal. 323.

Form No. 47. — Objections to Issuance of Letters of Administration to Applicant.

[Title of Court and Estate.]

Now comes —, one of the heirs at law of —, deceased, and hereby files his written opposition to the granting of the petition of —, heretofore filed herein, praying that letters of administration be granted to him, said —, upon the estate of —, deceased, and alleges as follows:—

1. That said petitioner, —, is under the age of majority;
2. That said petitioner, —, is not a *bona fide* resident of this state;
3. That said petitioner, —, has been heretofore convicted of an infamous crime, to wit, forgery; that said conviction was had in the — court of the — county of —, in the state of —, on the — day of —, A. D. 18—;
4. That said petitioner, —, is incompetent to perform the duties of the trust of administrator of said estate by reason of his drunkenness, improvidence, want of understanding, and want of integrity;—

Wherefore petitioner prays that the application of said — for letters of administration be denied, and that this court will make such other or further order in the premises as may be proper.

—, Petitioner.

—, Attorney for Petitioner.

§ 61. [1375.] **What Proof Required.** — On the hearing, it being first proved that notice has been given as herein required, the court must hear the allegations and proof of the parties, and order the issuing of letters of administration to the party best entitled thereto.

See note to § 59, *ante*.

Arizona. — Same. Rev. Stats., sec. 1025.

Idaho. — Same. Rev. Stats., sec. 5361.

Montana. — Same. Comp. Stats., p. 291, sec. 65.

Nevada. — Same. Gen. Stats., sec. 2729.

Utah. — Same. Comp. Laws, sec. 4045.

Wyoming. — On the hearing, the allegations and proofs of the parties must be heard, and the court or judge thereof must order the issuing of letters of administration to the party best entitled thereto. Laws 1890-91, p. 255, sec. 9.

On application for letters, a decedent was indebted to him: *In re creditor* can testify to the fact that *Welch*, Myr. Prob. 202.

Appointment of an administrator while there exists one in office is void: *Holmes v. O. & C. R. R. Co.*, 7 Saw. 380; 6 Saw. 262.

An order appointing or removing an administrator cannot be collaterally attacked: *Ramp v. McDaniel*, 12 Or. 108.

Administration is void when

granted by a wrong ordinary; and voidable when granted to a wrong person: *Ramp v. McDaniel*, 12 Or. 108.

An order appointing an administrator, made upon a petition setting forth the jurisdictional facts, amounts to an adjudication of the existence of such facts: *In re Griffith*, 84 Cal. 107.

Form No. 48. — Order Appointing Administrator.

[Title of Court and Estate.]

The petition of —, praying for letters of administration of the estate of —, deceased, coming on regularly to be heard, and due proof having been made to this court that due and legal notice of the hearing of said petition has been given by the clerk of this court, and it having been proved by the oath of —, that the said — died on the — day of —, A. D. 18—, intestate, in the — county of —, state of —; that he was a resident of the — county of —, state of —, at the time of his death, and that he has left estate in the — county of —, state of —, and within the jurisdiction of this court; that the petitioner is legally competent, and no person appearing to contest the application of the said petitioner, —

It is ordered that letters of administration of the estate of said —, deceased, issue to the said petitioner, —, upon his taking the oath, and filing a bond, according to law, in the sum of — dollars.

—, Judge of — Court.

Dated —.

§ 62. [1376.] Evidence of Notice. — An entry in the minutes of the court that the required proof was made and notice given shall be conclusive evidence of the fact of such notice.

See § 59, *ante*, and note.

Arizona. — Same. Rev. Stats., sec. 1026.

Idaho. — Same. Rev. Stats., sec. 5662.

Montana. — Same. Comp. Stats., p. 291, sec. 66.

Nevada. — Same. Gen. Stats., sec. 2730.

Utah. — Same. Comp. Laws, sec. 4046.

§ 63. [1377.] Grant to Any Applicant. — Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the

administration, when such persons fail to appear and claim the issuing of letters to themselves.

Arizona. — Same. Rev. Stats., sec. 1027.

Idaho. — Same. Rev. Stats., sec. 5363.

Montana. — Same. Comp. Stats., p. 291, sec. 67.

Nevada. — Same. Gen. Stats., 2731.

Utah. — Same. Comp. Laws, sec. 4047.

Wyoming. — Same. Laws 1890-91, p. 255, sec. 10.

If one entitled to administer another, and thereafter may refuse upon an estate refuses to apply to revoke those letters: *In re Keane*, for letters, the court may appoint 56 Cal. 407.

§ 64. [1878.] What Proofs must be Made before Granting Letters of Administration. — Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others; and the court may also examine any other person concerning the time, place, and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose.

Arizona. — Same. Rev. Stats., sec. 1028.

Idaho. — Same. Rev. Stats., sec. 5364.

Montana. — Same. Comp. Stats., p. 291, sec. 68.

Nevada. — Same. Gen. Stats., sec. 2732.

Utah. — Same. Comp. Laws, sec. 4048.

The residence of deceased in the county where the application is made is one of the jurisdictional facts which the court must determine from the evidence before it. Such determination, although it may be erroneous, is valid until set aside in some appropriate proceeding. It cannot be attacked collaterally: *In re Griffith*, 84 Cal. 107.

§ 65. [1879.] Request in Writing. — Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the state, affidavits taken *ex parte* before any officer authorized by the laws of this state to take acknowledgments and administer oaths out of this state may be received as *prima facie* evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court.

The above section does not repeal Cal. Code Civ. Proc., sec. 1369 (§ 55, *ante*): *In re Beech*, 63 Cal. 458.

Arizona. — Same. Rev. Stats., sec. 1029.

Idaho. — Same. Rev. Stats., sec. 5365.

Montana. — Same, with last sentence omitted. Comp. Stats., p. 292, sec. 69.

Nevada. — Same, except that the words "or depositions" are inserted after the word "affidavits." Gen. Stats., sec. 2733.

Utah. — Same, with last sentence omitted. Comp. Laws, sec. 4049.

Wyoming. — Same. Laws 1890-91, p. 255, sec. 11.

A non-resident executor cannot nominate an administrator: *In re Murphy*, Myr. Prob. 185; *In re Garber*, 74 Cal. 338.

The surviving husband or wife of a deceased person, though incompetent to serve as administrator on account of non-residence, nevertheless is entitled to nominate a suitable person for administrator: *In re Cotter*, 54 Cal. 215.

Where a distributee is legally incapable of administering an estate, his recommendation of another party as administrator is addressed to the discretion of the court, and is of no legal consequence: *In re Morgan*, 53 Cal. 243.

The sixty-sixth section of the old act (California), concerning the estates of deceased persons (corresponding with above section), does not restrict the power of appointment given in the fifty-second section (corresponding to § 51, *ante*), the ob-

ject of this section (the sixty-sixth), authorizing the appointment of some competent person, at the request of the person entitled, to be joined with such person, was to allow those entitled to letters the aid of others more competent: *In re Kirtlan*, 16 Cal. 162.

The public administrator has a better right to letters of administration than the nominee of a married daughter of the deceased: *In re Kelly*, 57 Cal. 81.

A public administrator is entitled to letters of administration in preference to a creditor of an intestate decedent, or to the nominee of a non-resident heir: *In re Hyde*, 64 Cal. 228; *In re McKinnon*, 64 Cal. 226; *In re Beech*, 63 Cal. 458.

The court may exercise its discretion in appointing the nominee of the grandmother of an unmarried deceased minor in preference to a creditor, when she is the sole heir: *In re Wyche*, Myr. Prob. 85.

Form No. 49. — Request for the Appointment of an Administrator in Place of Person Entitled, to be Annexed to the Petition for the Appointment of Such Administrator.

[Title of Court and Estate.]

The undersigned respectfully shows to this court that she is the surviving wife of —, deceased, and, as such, is entitled to administer upon the estate of said deceased; that your petitioner does not desire to undertake the administration of said estate, but requests that —, whose petition for letters is presented and filed herewith, may be appointed administrator of said estate in her stead.

NOTE. — When the person entitled is a non-resident of the state, affidavits of identification must accompany the above request. For petition to accompany this form, see Form No. 45, § 58, *ante*.

ARTICLE V.

REVOCATION OF LETTERS AND PROCEEDINGS THEREFOR.

- § 66. Revocation of letters of administration.
- § 67. When petition filed, citation to issue.
- § 68. Hearing of petition for revocation.
- § 69. Prior rights of relatives entitles them to revoke prior letters.

§ 66. [1383.] Revocation of Letters of Administration. — When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person, at the written request of any one of them, may obtain the revocation of the letters and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration may be issued to him.

Arizona. — Same, except that the clause "who is competent, or any competent person, at the written request of any one of them," is omitted. Rev. Stats., sec. 1030.

Idaho. — Same as California. Rev. Stats., sec. 5366.

Montana. — Same as California. Comp. Stats., p. 292, sec. 70.

Nevada. — Same as Arizona. Gen. Stats., sec. 2734.

Utah. — Same as California, except that after the words "who is competent," these words are interpolated, viz.: "and who has not had any opportunity to apply." Comp. Laws, sec. 4050.

Wyoming. — Same as California. Laws 1890-91, p. 255, sec. 12.

Letters of Administration, to Whom to be Issued: See § 51, *ante*.

The word "competent," as used here, signifies not addicted to drunkenness; not imprudent; not wanting in integrity nor understanding: *In re Pacheco*, 23 Cal. 476.

Incompetent Persons: See §§ 55, 56, *ante*.

Revocations: See §§ 109-113, *post*.

Granting fresh letters is per se a revocation of the old: *McCauley v. Harvey*, 49 Cal. 505. See also § 69, *post*.

Affidavit: See Cal. Code Civ. Proc., secs. 2009, 2115.

A prior right to letters of administration may be asserted at any time against one who has obtained a grant of letters by virtue of a secondary right, except where the applicant has waived his right and consented to the

former appointment: *In re Wooten*, 56 Cal. 323; *In re Keane*, 56 Cal. 407.

Where notice in the manner prescribed by law has been given of an application for letters of administration, and upon the hearing no opposition is made, and letters are issued to the applicant, who is not within the degrees of consanguinity mentioned in the statute, the only parties who can obtain a revocation of the letters as an absolute, unqualified right are the wife, child, father, mother, or brother of the intestate, and they are only authorized to have the letters revoked by presenting a petition praying the revocation, and that letters may be issued to him or her: *In re Carr*, 25 Cal. 585.

A revocation of the letters of the first administrator is essential to the appointment of another person to suc-

ceed him. An order of court directing such removal is the only competent evidence thereof: *Haynes v. Meeks*, 20 Cal. 288; 10 Cal. 110; *Schroder v. Superior Court*, 70 Cal. 343.

The contrary is decided in *McCaulley v. Harvey*, 49 Cal. 497.

Application by the public administrator of one county for the revocation of letters issued to the public administrator of another county

is not authorized by above section: *In re Griffith*, 84 Cal. 107.

If petition for revocation of letters of administration does not show that the jurisdictional facts did not exist, it will be presumed for the purposes of the application that they did exist. So held as to the facts of notice and residence: *In re Griffith*, 84 Cal. 107.

Form No. 50.—Petition to Revoke Letters of Administration, and for Issuance of Letters to Relative having Prior Right.

[Caption, Form 1, § 5, *ante*.]

1. (Follow subd. 1 of Form No. 44, § 57, *ante*.)
2. (Follow subd. 2 of Form No. 44, § 57, *ante*.)
3. (Follow subd. 3 of Form No. 44, § 57, *ante*.)
4. (Follow subd. 4 of Form No. 44, § 57, *ante*.)
5. (Follow subd. 5 of Form No. 44, § 57, *ante*.)

6. That an order was duly made and entered by this court on the — day of —, A. D. 18—, appointing —, a creditor of decedent, administrator of the estate of said deceased, and letters of administration were by said order issued to said — as the administrator thereof, and thereupon said — duly qualified and received said letters, and entered upon his duties as such administrator, and is now administering upon the estate of said decedent;

7. That your petitioner is a — of said deceased, and has a right to letters of administration prior to that of —, who has been appointed, as aforesaid, such administrator;—

Wherefore petitioner prays that the letters of administration heretofore issued to said — be revoked, and that letters of administration upon the estate of said —, deceased, be issued to petitioner.

—, Petitioner.

—, Attorney for Petitioner.

§ 67. [1384.] **When Citation to Issue.**—When such petition is filed, the clerk must, in addition to the notice provided in section thirteen hundred and seventy-three, issue a citation to the administrator to appear and answer the same at the time appointed for the hearing.

For section 1373, see § 59, *ante*.

Citation: See §§ 317-321, *post*.

Arizona. — Same. Rev. Stats., sec. 1031.

Idaho. — Same. Rev. Stats., sec. 5367.

Montana. — Same. Comp. Stats., p. 292, sec. 71.

Nevada. — Same, except that the clause between the words "must" and "issue" is omitted. Gen. Stats., sec. 2735. See § 121, *post*.

Utah. — Same as California. Comp. Laws, sec. 4051.

Wyoming. — Same as California. Laws 1890-91, p. 256, sec. 13.

§ 68. [1385.] Hearing of Petition for Revocation.

— At the time appointed, the citation having been duly served and returned, the court must proceed to hear the allegations and proofs of the parties; and if the right of the applicant is established, and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked.

"Competent," definition of: See note to § 66, *ante*.

Arizona. — Same. Rev. Stats., sec. 1032.

Idaho. — Same. Rev. Stats., sec. 5368.

Montana. — Same. Comp. Stats., p. 292, sec. 72.

Nevada. — Same. Gen. Stats., sec. 2736. See § 121, *post*.

Utah. — Same. Comp. Laws, sec. 4052.

Wyoming. — Same, except that the words "or judge" are inserted after the word "court." Laws 1890-91, p. 256, sec. 14.

A superior court has no power to appoint a special administrator if the executor has not been suspended or removed. An order appointing a special administrator will not operate as a removal of the executor if the latter has never been cited to appear, and has never appeared, to show cause why his letters should not be revoked: *Schroeder v. Superior Court*, 70 Cal. 343.

Form No. 51. — Order Revoking Letters of Administration, and Appointing Person having Prior Right.

[Title of Court and Estate.]

On this day, the petition of — coming on to be heard, and it appearing that an order was heretofore duly made and entered by this court appointing — administrator of the estate of —, deceased, and that letters of administration have been duly issued under said order to said —, and that he is now the duly qualified and acting administrator of said estate; that said petitioner, —, is the — of said decedent, and by reason of such relationship has a right to letters of administration prior to that of said —, the administrator aforesaid; —

It is therefore ordered and adjudged that the letters of administration heretofore issued herein to — be and they are hereby revoked, and that letters of administration upon the estate of said —, deceased, be issued to said —, the said petitioner, upon his filing a bond in the penal sum of — dollars, and taking the oath required by law.

Dated —. —, Judge of the — Court.

§ 69. [1886.] Prior Rights of Relatives. — The surviving husband or wife, when letters of administration have been granted to a child, father, brother, or sister of the intestate, or any of such relatives, when letters have been granted to any other of them, may assert his prior right, and obtain letters of administration, and have the letters before granted revoked in the manner prescribed in the three preceding sections.

Arizona. — Same, with the following sentence added: "But where letters have been granted to a person other than the one entitled upon the written request of the person entitled to letters, the person so appointed at the request of the person entitled shall not be removed except for cause as other administrators are removed for cause." Rev. Stats., sec. 1033.

Idaho. — Same as California. Rev. Stats., sec. 5369.

Montana. — Same as California. Comp. Stats., p. 292, sec. 73.

Nevada. — Same as California. Gen. Stats., sec. 2737.

Utah. — Same as California. Comp. Laws, sec. 4053.

Wyoming. — Same as California. Laws 1890-91, p. 256, sec. 15.

Married Woman as Administrator: See § 56, *ante*.

Wife as Heir: *In re Linehan*, Myr. Prob. 83.

This right cannot be asserted by a person who has waived his rights to letters by requesting the court, in

writing, to appoint the acting administrator: *In re Wooten*, 56 Cal. 327; *In re Keane*, 56 Cal. 407.

Duty of Court: *In re Pacheco*, 23 Cal. 476.

Law of Case: *In re Pacheco*, 29 Cal. 224.

ARTICLE VI.

OATHS AND BOND OF EXECUTORS AND ADMINISTRATORS.

§ 70. Administrator or executor to take oath — Letters and bond to be recorded.

§ 71. Bond of administrators, form and requirements of.

§ 72. Additional bonds, when required.

§ 73. Conditions of bonds.

§ 74. Each or more than one administrator to give separate bonds.

§ 75. Several recoveries may be had on same bond.

§ 76. Bonds, and justification of sureties on — Must be approved.

- § 77. Citation and requirements of judge on deficient bond — Additional security.
- § 78. Right ceases when.
- § 79. When bond may be dispensed with.
- § 80. Petition showing failing sureties and asking for further bonds.
- § 81. Citation to executor, etc., to show cause against such application.
- § 82. Further security may be ordered.
- § 83. Neglecting to obey order.
- § 84. Suspending powers of executor, etc.
- § 85. Further security ordered without application of party in interest.
- § 86. Release of sureties.
- § 87. Order relieving sureties.
- § 88. Neglect to give new sureties forfeits letters.
- § 89. Application to be determined out of term time.
- § 90. Liability of sureties.

§ 70. [1387.] Administrator or Executor to Take Oath. — Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath, before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by, executors or administrators, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estates, in books to be kept by him in his office for that purpose.

Arizona. — Same. Rev. Stats., sec. 1034.

Idaho. — Same. Rev. Stats., sec. 5370.

Montana. — Same. Comp. Stats., p. 292, sec. 74.

Nevada. — Same, except that oath must be taken before the probate judge or clerk, and the following is added: "And the said records, and duly certified copies taken therefrom, shall have the same force and effect in all cases whatsoever as the original papers would have." Gen. Stats., sec. 2739.

Oregon. — See Hill's Laws, sec. 1088, under § 71, *post*.

Utah. — Same as California. Comp. Laws, sec. 4054.

Washington. — Same as first sentence of California. Code Proc., sec. 905.

"The clerk shall record in a well-bound book kept for that purpose all letters testamentary and of administration, before they are delivered to the executors or administrators, and shall certify on such letters that they have been so recorded." Code Proc., sec. 896.

"The clerk shall record in a well-bound book kept for that purpose all bonds given by executors and administrators, and preserve the originals in regular file." Code Proc., sec. 923.

Wyoming. — Same as California. Laws 1890-91, p. 256, sec. 1.

Although section 2739 of the general statutes provides that "before letters . . . of administration shall be issued the administrator shall take and subscribe an oath . . . before the probate judge or clerk" for the performance of his duties, the authority of an administrator cannot be attacked in a collateral proceeding because the oath was not taken until after the letters were issued, and was then taken before a notary public, since the letters,

having been regularly issued, are valid until revoked, especially where the statutory oath was taken before the proper officer before trial, though after action brought: *Gallagher v. Holland*, Sup. Ct. Nevada, July 14, 1888.

The authority of an administrator cannot be attacked collaterally because the oath provided for in Nevada General Statutes, section 2739, was not taken until after the letters were issued: *Gallagher v. Holland*, 20 Nev. 164.

Form No. 52. — Oath to be Attached to Letters.

State of —, }
 — County of —. } ss.

I do solemnly swear that I will support the constitution of the United States of America, and the constitution of the state of —; that I will faithfully discharge the duties of — of the estate of —, deceased, according to law.

Sworn and subscribed to before me this — day of —,
 A. D. 18—.

—, Clerk.

By —, Deputy Clerk.

§ 71. [1388.] **Bond, Penalty of.**—Every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of California, with two or more sufficient sureties, to be approved by the superior court, or a judge thereof. In form, the bond must be joint and several, and the penalty must not be less than twice the value of the personal property, and twice the probable value of the annual rents, profits, and issues of real property belonging to the estate, which values must be ascertained by the superior court, or a judge thereof, by examining on oath the party applying, and any other persons.

Arizona. — Same. Rev. Stats., sec. 1035.

Idaho. — Same. Rev. Stats., sec. 5371.

Montana. — Same. Comp. Stats., p. 243, sec. 75.

Nevada. — Same, except that the following words are omitted: "And twice the probable value of the annual rents, profits, and issues of the real property." Gen. Stats., sec. 2740.

Oregon. — "No executor or administrator is authorized to act as such until he shall file with the clerk of the county court having jurisdiction of the estate an undertaking in a sum not less than double the probable value of the estate, with one or more sufficient sureties, to be approved by the county judge,

to be void upon the condition that such executor or administrator shall faithfully perform the duties of his trust according to law; *provided*, that when by the terms of his will a testator shall expressly declare that no bonds shall be required of his executors, such executors may act upon taking an oath to faithfully fulfill his trust without filing the undertaking in this section mentioned; *provided further*, that such executor shall be criminally and civilly liable as other executors and administrators are for any dereliction of duty." Hill's Laws, sec. 1088.

Utah. — Same as California. Comp. Laws, sec. 4055.

Washington. — Same as California. Code Proc., sec. 906.

"No judge of the superior court, no sheriff, clerk of a court, or deputy of either, and no attorney at law, shall be taken as surety in any bond required to be taken in any proceeding in probate." Code Proc., sec. 921.

"The judge shall take special care to take as sureties men who are solvent and sufficient, and who are not bound in too many other bonds; and to satisfy himself, he may take testimony, and examine, on oath, the applicant or person offered as surety." Code Proc., sec. 922.

"No bond required under the provisions of this chapter, and intended as such bond, shall be void for want of form or substance, recital or condition; nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond, the plaintiff may state its legal effect in the same manner as though it were a perfect bond." Code Proc., sec. 924.

"The applications and acts authorized by the foregoing sections in this chapter may be heard and determined in court or at chambers. All orders made therein must be entered upon the minutes of the court." Code Proc., sec. 925.

Wyoming. — Same as California, except that the court, judge, or commissioner, or clerk of the court, may approve the bond; and this clause is added: "And the sureties must justify on written oath made a part of said bond in double the amount of their individual undertaking." Laws 1890-91, p. 256, sec. 2.

The supreme court will not, in an action brought by an administrator, review the action of the probate court in ascertaining the value of the estate and fixing the amount of the administrator's bond: *Lucas v. Todd*, 28 Cal. 182.

Sureties on the bond of an administrator are not liable for his failure, after citation issued therefor, to render his final account, unless service of such citation has been made on the administrator: *Ashurst v. Fountain*, 67 Cal. 18.

An action is not maintainable upon an administrator's bond for the amount of a claim unlawfully paid by him, until he has made an accounting

to the court, and refused to pay any amount which may thereon be adjudged against him: *Weihe v. Statham*, 67 Cal. 84, 245.

It is a sufficient bond if made to the people of the state of California: *Tevis v. Randall*, 6 Cal. 635.

An administrator's bond expressing no amount is not a binding obligation: *Ewatts v. Steger*, 6 Or. 55.

An administrator cannot be sued on his bond, until final settlement of his account, and his removal for misconduct does not change the rule: *Adams v. Petrain*, 11 Or. 304; nor can the sureties be held until the liability of the principal is so determined: *Hamlin v. Kinney*, 2 Or. 92.

Judge may approve bond at chambers: Cal. Code Civ. Proc., 167.

Condition of Bond: See § 73, *post.*

Bond, when there are More than One Executor: See § 74, *post.*

This Bond Stands in Place of an Undertaking on Appeal: See

§ 591, *post.*

Kind of Money Payable under Bond: See § 90, *post.*

Form No. 53. — Bond of Administrator or Executor.

Know all men by these presents, that we, — as principal, and — and — as sureties, are held and firmly bound to the state of — in the sum of — dollars, lawful money of the United States of America, to be paid to the said state of —; for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of —, A. D. 18—.

The condition of the above obligation is such, that whereas, by an order of the — court of the — county of —, state of —, duly made and entered on the — day of —, A. D. 18—, the above-bounden — w— appointed — of the — of —, deceased, and letters — were directed to be issued to — upon — executing a bond according to law, in said sum of — dollars;—

Now, therefore, if the said —, as such —, shall faithfully execute the duties of the trust according to law, then this obligation to be void, otherwise to remain in full force and effect.

— [SEAL]

— [SEAL]

— [SEAL]

State of —. }
— County of —. } ss.

— and —, the sureties named in the above bond, being duly sworn, each for himself says that he is a —holder and resident within said state, and is worth the said sum of — dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this — day of —, A. D. 18—. —, Notary Public.

§ 72. [1389.] Additional Bonds, when Required.

— The superior court, or a judge thereof, must require an additional bond whenever the sale of any real estate belonging to an estate is ordered; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given, before receiving letters, or of any bond given in place thereof, is equal to twice the value of the personal property remaining in, or that will come into, the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold.

Arizona. — Same. Rev. Stats., sec. 1036.

Idaho. — Same. Rev. Stats., sec. 5372.

Montana. — Same. Comp. Stats., p. 293, sec. 76.

Nevada. — “The probate judge shall require an additional bond whenever the sale of any real estate belonging to an estate is ordered by him. The bond shall be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law. He shall also require bond and sufficient surety for the annual rents, issues, and profits of all real estate in his charge, as such executor or administrator, to be approved by the probate judge.” Gen. Stats., sec. 2740.

Utah. — Same as California. Comp. Laws, sec. 4056.

Washington. — Same as California. Code, sec. 908.

Wyoming. — Same as California. Laws 1890-91, p. 256, sec. 3.

Form No. 54.—Additional Bond to be Given on Sale of Real Estate by Administrator or Executor.

Know all men by these presents, that we, —, principal, and — and —, sureties, are held and firmly bound to the state of — in the sum of — dollars, lawful money of the United States of America, to be paid to the said state of —, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this — day of —, A. D. 18—.

The condition of the above obligation is such, that whereas, an order was made on the — day of —, A. D. 18—, by the — court of the — county of —, state of —, authoriz-

ing the above-named principal as administrator of the estate of —, deceased, to sell certain real estate belonging to the estate of said deceased, and an additional bond in the sum above named was ordered to be given before the said sale;—

Now, therefore, if the said —, as such administrator, shall well and truly execute the duties of the trust according to law, then this obligation to be void, otherwise to remain in full force and effect.

— [SEAL]

— [SEAL]

— [SEAL]

State of —, }
 — County of —. } ss.

— and —, being duly sworn, each for himself says that he is one of the sureties named in the above bond; that he is a resident and —holder within said state, and is worth the sum of — dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this — day of —,
 A. D. 18—. —, Notary Public.

§ 73. [1390.] Conditions of Bonds.—The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law.

Arizona. — Same. Rev. Stats., sec. 1037.

Idaho. — Same. Rev. Stats., sec. 5373.

Montana. — Same. Comp. Stats., p. 293, sec. 77.

Nevada. — Same. Gen. Stats., sec. 2740.

Oregon. — Hill's Laws, sec. 1088, under § 71, *ante*.

Utah. — Same. Comp. Laws, sec. 4057.

Washington. — Same. Code Proc., sec. 907.

Wyoming. — Same. Laws 1890-91, p. 257, sec. 4.

Decree settling account binds surety: See §§ 405, 406, *post*. But the liability does not attach until liability of principal is established: *Allen v. Tiffany*, 53 Cal. 16; *Chaquette v. Ortet*, 60 Cal. 594. See note to § 71, *ante*.

And the decree of the court of probate is conclusive upon him: *Id.*; *Irwin v. Backus*, 25 Cal. 214.

If the principal die without rendering an account, the account must

first be settled in equity before the surety can be charged: *Chaquette v. Ortet*, 60 Cal. 594; see also § 268, *post*, note.

Refusal of administrator to pay money into court when ordered to do so is not a breach of the condition of his bond: *Willson v. Hernandez*, 5 Cal. 443.

Bondsmen of an administrator who is charged with wasting assets of

the estate cannot defend on the ground that the succeeding administrator was negligent in first seeking to recover the assets from third parties, to whom they had been wrongfully transferred: *In re Connolly*, 73 Cal. 423.

§ 74. [1391.] To Give Separate Bonds.—When two or more persons are appointed executors or administrators, the superior court, or a judge thereof, must require and take a separate bond from each of them.

Arizona.—Same. Rev. Stats., sec. 1038.

Idaho.—Same. Rev. Stats., sec. 5374.

Montana.—Same. Comp. Stats., p. 293, sec. 78.

Nevada.—Same. Gen. Stats., sec. 2741.

Utah.—Same. Comp. Laws, sec. 4058.

Washington.—Same. Code Proc., sec. 909.

Wyoming.—Same. Laws 1890-91, p. 257, sec. 5.

§ 75. [1392.] Several Recoveries may be had.—The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted.

Arizona.—Same. Rev. Stats., sec. 1039.

Idaho.—Same. Rev. Stats., sec. 5375.

Montana.—Same. Comp. Stats., p. 293, sec. 79.

Nevada.—Same. Gen. Stats., sec. 2742.

Utah.—Same. Comp. Laws, sec. 4059.

Washington.—Same. Code Proc., sec. 910.

Wyoming.—Same. Laws 1890-91, p. 257, sec. 6.

Party beneficially interested may sue: Cal. Code Civ. Proc., sec. 367.

Joinder of Defendants: Cal. Code Civ. Proc., sec. 383.

Kind of Money Payable under Bond: See § 90, *post*.

No action is maintainable on the bond of an executor or administrator to recover for his neglect or misconduct in the sale of decedent's realty, unless the estate has suffered damage thereby; and where it appears the land was sold for its full value, it is presumed that no damage was suffered; and regarding any mismanagement of the proceeds, the party will be left to his remedy in the probate court: *Weihe v. Statham*, 67 Cal. 84, 245.

The bondsmen of an administrator charged with wasting assets of an estate cannot defend on the ground

that his successor was negligent in first seeking to recover assets in the hands of third parties, to whom they had been wrongfully transferred: *In re Connolly*, 73 Cal. 423.

An administrator and his sureties are liable for the damage, when the former does what the law prohibits, or does not exercise reasonable care and diligence in doing what the law enjoins: *McNabb v. Wizom*, 7 Nev. 830.

An administrator and his sureties are liable for money deposited in a bank by an administrator, and allowed to remain after the time when, if he had fulfilled his duty, it would have been distributed to those entitled, and is lost by the failure of the bank: *McNabb v. Wizom*, 7 Nev. 830.

An administrator cannot be sued on his bond until final settle-

ment of his account, and his removal for misconduct does not change the rule: *Adams v. Petrain*, 11 Or. 304; nor can the sureties be held until the liability of the principal is determined: *Hamlin v. Kinney*, 2 Or. 92.

A surety on an executor's bond is estopped from denying that the order appointing such executor was "duly made and entered," when the bond recites such to be the fact: *Moore v. Earl*, 91 Cal. 636.

§ 76. [1393.] Bonds, and Justification of Securities on.—In all cases where bonds or undertakings are required to be given under this title, the sureties must justify thereon in the same manner and in like amounts as required by section 1057 of this code, and the certificate thereof must be attached to and filed and recorded with the bond or undertaking. All such bonds and undertakings must be approved by a judge of the superior court before being filed or recorded.

Corporations may be sureties.

"In all cases where an undertaking or bond, with any number of sureties, is authorized or required by any provision of this code, or of any law of this state, any corporation with a paid-up capital of not less than one hundred thousand dollars, incorporated under the laws of this or any other state of the United States for the purpose of making, guaranteeing, or becoming a surety upon bonds or undertakings required or authorized by law, or which by the laws of the state where it was originally incorporated has such power, and which shall have complied with all the requirements of the law of this state regulating the formation or admission of these corporations to transact such business in this state, may become and shall be accepted as security or as sole and sufficient surety upon such undertaking or bond, and such corporate surety shall be subject to all the liabilities and entitled to all the rights of natural persons sureties; *provided*, that the insurance commissioner shall have the same jurisdiction and powers to examine the affairs of such corporations as he has in other cases; shall require them to file similar statements and issue to them a similar certificate. And whenever the liabilities of any such corporation shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up in sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency, and he shall publish the same once a week for three weeks in a daily San Francisco paper. And until such deficiency is paid up, such company shall not do business in this state. In estimating the condition of any such company, the commissioner shall allow as assets only such as are allowed under existing laws at the time, and shall charge as liabilities, in addition of eighty per cent of the capital stock, all outstanding indebtedness of the company, and a premium reserve equal to fifty per centum of the premiums charged by said company on all risks then in force." [New section approved March 16, 1889; took effect immediately.] Cal. Code Civ. Proc., sec. 1056.

Justification.

"In any case where an undertaking or bond is authorized or required by any

law of this state, the officer taking the same must, except in the case of such a corporation as is mentioned in the next preceding section, require the sureties to accompany it with an affidavit that they are each residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking or bond, over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking or bond exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than the amount specified in the undertaking or bond, if the whole amount be equivalent to that of two sufficient sureties. Any corporation such as is mentioned in the next preceding section may become one of such sureties. No such corporation shall be accepted in any case as a surety whenever its liabilities shall exceed its assets as ascertained in the manner provided in section ten hundred and fifty-six." [Amendment approved March 16, 1889; took effect immediately.] Cal. Code Civ. Proc., sec. 1057.

An act to facilitate the giving of bonds required by law, approved March 12, 1885. Cal. Stats. 1885, p. 114.

Corporations may be sureties.

SEC. 1. Whenever any person who now or hereafter may be required or permitted by law to make, execute, and give a bond or undertaking, with one or more sureties, conditioned for the faithful performance of any duty, or for the doing or not doing of anything in said bond or undertaking specified, any head of department, board, court, judge, officer, or other person who is now or shall hereafter be required to approve the sufficiency of any such bond or undertaking, or the sureties thereon, may accept as sole and sufficient surety on such bond or undertaking any corporation incorporated under the laws of any state of the United States for the purpose of making or guaranteeing bonds and undertakings required by law, and which shall have complied with all the requirements of the laws of this state regulating the admission of such corporation to transact such business in this state; and all such corporations are hereby vested with full power and authority to make and guarantee such bonds and undertakings, and shall be subject to all the liabilities and entitled to all the rights of natural persons sureties.

Guaranty not taken when.

SEC. 2. It is further provided, that the guaranty of any such company shall not be accepted by heads of departments, or others, as provided in section one of this act, whenever its liabilities shall exceed its assets, as ascertained in the manner provided in section three of this act.

Notice to be given of deficiency of assets.

SEC. 3. Whenever the liabilities of any such company shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up within sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency, and he shall publish the same once a week for three weeks in a daily San Francisco paper; and thenceforth, and until such deficiency is paid up, such company shall not do business under the provisions of this act.

An act authorizing certain corporations to act as executor, and in other capacities, and to provide for and regulate the administration of trusts by such corporations, approved April 6, 1891. Cal. Stats. 1891, p. 490.

Corporation may act as executor, etc. — Oath — Compensation.

SEC. 1. Any corporation which has or shall be incorporated under the general incorporation laws of this state, authorized by its articles of incorporation to act as executor, administrator, guardian, assignee, receiver, depository, or trustee, and having a paid-up capital of not less than two hundred and fifty thousand dollars, of which one hundred thousand dollars shall have been actually paid in, in cash, may be appointed to act in such capacity in like manner as individuals. In all cases in which it is required that an executor, administrator, guardian, assignee, receiver, depository, or trustee shall qualify by taking and subscribing an oath, or in which an affidavit is required, it shall be a sufficient qualification by such corporation if such oath shall be taken and subscribed, or such affidavit made, by the president, or secretary, or manager thereof; and such officer shall be liable for the failure of such corporation to perform any of the duties required by law to be performed by individuals acting in like capacity, and subject to like penalties; and such corporation shall be liable for such failure to the full amount of its capital stock; *provided*, any such appointment as guardian shall apply to the estate only, and not to the person. Such corporations shall be entitled to and shall be allowed proper compensation for all the services performed by them under the foregoing provisions of this act; but such compensation shall not exceed that allowed to natural persons for like services.

Court may order deposits.

SEC. 2. Any court having appointed and having jurisdiction of any executor, administrator, guardian, assignee, receiver, depository, or trustee, upon the application of such officer or trustee, or upon the application of any person having an interest in the estate administered by such officer or trustee, after notice to the other parties in interest as the court may direct, and after a hearing upon such application, may order such officer or trustee to deposit any moneys then in his hands or which may come into his hands thereafter, and until the further order of said court with any such corporation; and upon deposit of such money, and its receipt and acceptance by such corporation, the said officer or trustee shall be discharged from further care or responsibility therefor. Such deposits shall be paid out only upon the orders of said court.

Public administrator may deposit funds with such corporation.

SEC. 3. And it shall be lawful for any public administrator to deposit with any such corporation doing business in the county, or city and county, in which he is acting as such administrator, any and all moneys of any estate upon which he is administering, not required for the current expenses of the administration. And such deposits shall relieve the public administrator from depositing with the county treasurer the moneys so deposited with such corporation. Moneys deposited by a public administrator may be drawn upon the order of such administrator, countersigned by a judge of a superior court, when required for the purpose of administration or otherwise. (See also next section.)

Bond reduced when.

SEC. 4. Whenever, in the judgment of any court having jurisdiction of any estate in process of administration by any executor, administrator, guardian, assignee, receiver, depositary, or trustee, the bond required by law of such officer shall seem burdensome or excessive, upon application of such officer or trustee, and after such notice to the parties in interest as the court shall direct, and after a hearing on such application, the said court may order the said officer or trustee to deposit with any such corporation, for safe-keeping, such portion or all of the personal assets of said estate as it shall deem proper; and thereupon said court shall, by an order of record, reduce the bond to be given or theretofore given by such officer or trustee, so as to cover only the estate remaining in the hands of said officer or trustee; and the property as deposited shall thereupon be held by said corporation, under the orders and directions of said court. Any court having jurisdiction of an estate being administered by a public administrator may direct such public administrator to deposit all or any part of the moneys of the estate not required for the current expenses of the administration with any such corporation doing business in the county, or city and county, where such public administrator is acting.

Corporation responsible.

SEC. 5. Such corporations shall not be required to give any bond or security in case of any appointment hereinbefore provided for, except as hereinafter provided, but shall be responsible for all investments which shall be made by it of the funds which may be intrusted to it for investment by such court, and shall be further liable as natural persons in like positions now are, and as hereinafter provided. The amount of money which any such corporation shall have on deposit at any time shall not exceed ten times the amount of its paid-up capital and surplus, and its outstanding loans shall not at any time exceed said amount.

Interest.

SEC. 6. Such corporations shall pay interest upon all moneys held by them by virtue of this act, at such rate as may be agreed upon at the time of its acceptance of any such appointment, or as shall be provided by the order of the court.

Duty of corporation.

SEC. 7. Each corporation, before accepting any such appointment or deposit, shall deposit with the treasurer of state, for the benefit of the creditors of said corporation, the sum of two hundred thousand dollars in bonds of the United States, or municipal bonds of this state, or in mortgages on improved and productive real estate in this state, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon. The bonds and securities so deposited may be exchanged from time to time for other securities, receivable as aforesaid. Said bonds of the United States, or municipal bonds of this state, to be registered in the name of said treasurer officially, and all said securities to be subject to sale and transfer, and to the disposal of the proceeds by said treasurer, only on the order of a court of competent jurisdiction, and as hereinafter provided.

(From section 7 to 20 this act provides regulations to be followed by such corporations. They have been omitted, as not within the scope of this work.)

SEC. 20. All laws and parts of laws in conflict with the provisions of this act are hereby repealed.

SEC. 21. This act shall take effect and be in force from and after its passage.

Arizona. — Same as California, § 76, *supra*. Rev. Stats., sec. 1040.

Idaho. — Same as California, § 76, *supra*. Rev. Stats. sec. 5376.

Montana. — Same as California (§ 76, *supra*), except that "as required in cases of appeal to the supreme court in the civil practice act" is substituted for "as required by section 1057 of this code." Comp. Stats., p. 293, sec. 80.

Nevada. — "In all cases where bonds are required by this act, the sureties must justify on oath before the judge or clerk of a court having a seal, or before a notary public, or before a justice of the peace of the county, to the effect that they are householders or freeholders within this state, and worth the amount for which they become surety, over and above all just debts and liabilities, exclusive of property exempt from execution, and such justification must be signed by the sureties and certified by the officer taking the same attached to and filed with the bond. Where the whole penal sum of such bond exceeds two thousand dollars, sureties may go thereon for any sum not less than five hundred dollars, so that the whole be equal to two sufficient sureties for the whole penal sum." Gen. Stats., sec. 2743.

Corporations may be sureties, etc.

"Any company incorporated and organized under the laws of any state of the United States for the purpose of transacting business as surety on obligations of persons or corporations, and which has complied with all the requirements of the law regulating the admission of such companies to transact business in this state, may, upon production of evidence of solvency and credit satisfactory to the judge, head of department, or other officer authorized to approve such bond, be accepted as surety upon the bond of any person or corporation required by the laws of this state to execute a bond, and if such surety company shall furnish satisfactory evidence of its ability to provide all the security required by law, no additional security may be exacted; but other surety may, in the discretion of the official authorized to approve such bond, be required, and such surety company may be released from its liability on the same terms and conditions as are by law prescribed for the release of individuals, it being the true intent and meaning of this act to enable corporations created for that purpose to become surety on bonds required, subject to all the rights and liabilities of private parties." Stats. 1887, pp. 86, 87, sec. 1.

"Any court or officer whose duty it is to pass upon the account of any person or corporation required by law to give a bond or undertaking may, whenever such person or corporation has given any such surety company as security upon said bond or undertaking, allow in the settlement of such account a reasonable sum for the expense of procuring such surety." Stats. 1887, p. 87, sec. 2.

Oregon. — "Whenever the penal sum mentioned in the undertaking prescribed in the preceding section [see § 71, *ante*] exceeds two thousand dollars,

three or more sureties may become severally liable for portions of said sum, if the aggregate sum for which such sureties become liable shall equal the penal sum required in the undertaking." Hill's Laws, sec. 1089.

Corporations as sureties.

"Any surety company with a paid-up capital of two hundred and fifty thousand dollars, and having assets of five hundred thousand dollars, incorporated under the laws of any state of the United States, either solely or among other things for the purpose of transacting business as surety on obligations of persons or corporations, may transact such surety business in this state upon complying with the provisions of this act, and not otherwise." Hill's Laws, sec. 3279.

Solvency of such corporation.

"Any surety company may, on production of evidence of solvency and credit, satisfactory to the judge, court, head of department, or other officer authorized to approve any bond or undertaking, be accepted as surety upon the bond or undertaking of any person or corporation required by the laws of this state to execute a bond or undertaking; and if such company shall furnish satisfactory evidence of its ability to provide all the security required by law, no additional surety may be exacted; but other surety may, in the discretion of the official authorized to approve such undertaking, be required, and such surety (surety company) may be released from its liability on the same terms and conditions as are by law prescribed for the release of individuals; it being the true intent and meaning of this act to enable corporations created for that purpose to become surety on bonds or undertakings required by law, subject to all the rights and liabilities of private parties." Hill's Laws, sec. 3282.

Utah. — Same as § 76, *supra*, except that after the word "required" these words are substituted, viz., "in the general provisions of the Code of Civil Procedure," in lieu of "by section 1057 of this code." Comp. Laws, sec. 4060.

Corporations may be administrators, etc.

"Loan, trust, or guaranty associations which may heretofore have been incorporated or which may hereafter be incorporated under the provisions of this act for the insurance of owners of real estate from loss by reason of defective titles, liens, and encumbrances, or for other purposes, shall have the power and right . . . 2. To act as assignees, agents, receivers, guardians of the estates of minors and incompetent persons, executors, administrators, and to execute trusts of every description not inconsistent with the laws of this territory or of the United States; 3. To become sole security in any case where by law one or more sureties may be required for the faithful performance of any trust, office, duty, action, or engagement; . . . 8. To become security upon any writ of error or appeal, or in any proceeding instituted in any court of this territory in which security may be required; *provided, however*, that nothing in this act shall be so construed as to dispense with the approval of such body, corporation, court, or officer as is by law now required to approve such security; *provided, however*, that before exercising any of the powers mentioned in this section, each such corporation shall have paid up of its capital not less than one hundred thousand dollars if transacting business in cities of the first class, and not less than twenty-five thousand dollars if transacting business

in cities of the second or third class, which amount of its capital shall be paid up in money, and not by the transfer of any other property, and such amount of capital shall by such corporation be kept in money on hand, or on deposit in banks, or invested in first mortgages in real estate situated in Utah Territory, the amount invested in any mortgage not to exceed fifty per cent of the value of the land so mortgaged, or in bonds of first or second class cities of this territory, or in bonds of Utah Territory, or of the United States. Stats. 1890, pp. 106, 107, sec. 1.

“Whenever any such company shall receive and accept the office or appointment of assignee, receiver, guardian, executor, administrator, or to be directed to execute any trust whatever, the capital of the said company shall be taken and considered as security required by law for the faithful performance of the duties as aforesaid, and shall be absolutely liable in case of any default whatever, and no bond shall be required of it for the faithful performance of such trust.” Stats. 1890, p. 108, sec. 6.

“When any such corporation is appointed as executor, administrator, guardian, or receiver, or acts as a surety, any oath or affidavit now required by law to be taken on such appointment or when so acting may be taken by any officer of such corporation in its behalf.” Stats. 1890, p. 108, sec. 7.

“The powers conferred by this act shall apply to all corporations now existing or hereafter to be incorporated for the purpose of insuring titles, or of doing business as a loan, trust, or guaranty association.” Stats. 1890, p. 109, sec. 8.

Washington. — “In all cases where bonds or undertakings are required to be given under this title, the sureties must possess the qualifications and justify thereon in the same manner as required, for bail upon an arrest,” etc. Other provision of section same as California, after the word “code,” in line 5. Code Proc., sec. 911.

Corporations may be Executors, etc.: See *supra*; also § 39, *ante*.

§ 77. [1394.] **New Bond Required.** — Before the judge approves any bond required under this title, and after its approval, he may of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one or more of them, are not worth as much as they have justified to, order a citation to issue, requiring such sureties to appear before him, at a designated time and place, to be examined touching their property and its value; and the judge must, at the same time, cause a notice to be issued to the executor or administrator, requiring his appearance on the return of the citation, and on its return he may examine the sureties, and such witnesses as may be produced, touching the property of the sureties and its value; and if, upon such examination, he is satisfied that the bond is insufficient, he must require sufficient additional security.

Citations, Notices, etc.: See §§ 317-321, *post*; also Cal. Code Civ. Proc., secs. 1010 et seq.

Arizona. — Same as California. Rev. Stats., sec. 1041.

Idaho. — "Before the probate judge approves any bond required under this title, he may, of his own motion, or at any time after the approval of such bond, upon the motion of any person interested in the estate"; balance of section same, except that the following is added at the end: "Within such time as may be reasonable, not less than five days." Rev. Stats., sec. 5377.

Montana. — Same as California. Comp. Stats., p. 293, sec. 81.

Nevada. — Same as Idaho. Gen. Stats., sec. 2744.

Oregon. — "Whenever the amount of an executor's or administrator's undertaking is insufficient, or the sureties therein, or either of them, have become non-residents of this state, or are likely to or have become insolvent, such executor or administrator shall be required to give a new and sufficient undertaking. The application for such new undertaking may be made by any heir, legatee, devisee, creditor, or other person interested in the estate, and in the manner prescribed in section 1094 for the removal of executors and administrators." Hill's Laws, sec. 1096. See also Hill's Laws, sec. 1094, under § 109, *post*.

Utah. — Same as California. Comp. Laws, sec. 4061.

Washington. — Same as California. Code Proc., sec. 912.

"When it comes to his knowledge that the bond of any executor or administrator is from any cause insufficient, the judge, without any application, must cause him to be called to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested." Code Proc., sec. 920.

"Such additional bond, when given and approved, shall discharge the former sureties from any liability arising from the misconduct of the principal after the filing of the same, and such former sureties shall only be liable for such misconduct as happened prior to the giving such new bond." Code Proc., sec. 913.

Wyoming. — Same as California. Laws 1890-91, p. 257, sec. 7.

§ 78. [1395.] Right Ceases when. — If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, must be appointed to the administration.

Arizona. — Same. Rev. Stats., sec. 1042.

Idaho. — Same. Rev. Stats., sec. 5378.

Montana. — Same. Comp. Stats., p. 294, sec. 82.

Nevada. — Same. Gen. Stats., sec. 2745.

Utah. — Same. Comp. Laws, sec. 4062.

Washington. — Same. Code Proc., sec. 914.

Wyoming. — Same. Laws 1890-91, p. 257, sec. 8.

§ 79. [1396.] Bond may be Dispensed with. — When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue, and sales of real estate be made and confirmed, without any bond; unless the court, for good cause, require one to be executed; but the executor may, at any time afterward, if it appears from any cause necessary or proper, be required to file a bond as in other cases.

Arizona. — Same. Rev. Stats., sec. 1043.

"Every person authorized by law to make a will may direct in said will that no bond or other proceeding in court shall be required of the person or persons named therein as executor or executors, other than the probating of the will and the filing of an inventory and appraisal of the estate, and letters testamentary shall be issued to such person or persons without any bond being required." Rev. Stats., sec. 3253.

"Any person capable of making a will may so provide in his will that no other action shall be had in the probate court in relation to the settlement of his estate than the probating and recording of his will and the return of an inventory, appraisal, and list of claims of his estate." Rev. Stats., sec. 1265.

"In cases mentioned in the preceding section, any person having a debt or claim against said estate may enforce the payment of the same by suit against the executor of such will, and the judgment recovered against the executor shall be paid out of the assets of said estate as other judgments against an executor are paid." Rev. Stats., sec. 1266.

"If such will does not distribute the entire estate of the testator, or provide a means for the partition of said estate, the executor shall have the right to file his final account in the court in which the will was probated, and ask partition and distribution of the estate, and the same shall be partitioned and distributed in the manner provided for the partition and distribution of estates administered under the direction of the court." Rev. Stats., sec. 1269.

Idaho. — Same as California. Rev. Stats., sec. 5379.

Montana. — Same as California. Comp. Stats., p. 294, sec. 83.

Nevada. — Same as California. Gen. Stats., sec. 2746.

Utah. — Same as California. Comp. Laws, sec. 4063.

Washington. — Same as California. Code Proc., sec. 915.

Wyoming. — Same as California. Laws 1890-91, p. 257, sec. 9.

Section 1401 of the Code of Civil Procedure (§ 84, *post*), which provides that in certain cases the powers of an executor may be suspended upon an application for an order requiring him to give bonds, does not conflict with the above section, which gives the general power to require a

bond in proper cases: *In re White*, 53 Cal. 19.

If bond is waived by deceased partner in the will nominating surviving partner as executor, the latter will still be required to give bond as administrator of the partnership estate: *Palicio v. Bigne*, 15 Or. 142.

§ 80. [1397.] Petition Showing Failing Sureties. — Any person interested in an estate may, by verified petition,

represent to the superior court, or a judge thereof, that the sureties of an executor or administrator thereof have become, or are becoming, insolvent, or that they have removed, or are about to remove, from the state, or that from any other cause the bond is insufficient, and ask that further security be required.

Arizona. — Same. Rev. Stats., sec. 1044.

Idaho. — Same. Rev. Stats., sec. 5380.

Montana. — Same. Comp. Stats., p. 294, sec. 84.

Nevada. — Same. Gen. Stats., sec. 2747.

Oregon. — See Hill's Laws, sec. 1096, under § 77, *ante*.

Utah. — Same as California, except that the words "or a judge thereof" are omitted. Comp. Laws, sec. 4064.

Washington. — Same as California. Code Proc., sec. 916.

Wyoming. — Same as California. Laws 1890-91, p. 258, sec. 10.

The further security here provided for is an additional security, and the new sureties are liable for the acts of the principal as executor, etc., irrespective of the time of the execution of the bond: *Lacoste v. Splivalo*, 64 Cal. 35. **Insufficient Security:** See § 85, *post*.

Form No. 55.—Petition for Further Security where Sureties of Administrator are Insufficient.

[Caption, Form 1; § 5, *ante*.]

1. That heretofore — was, by the order of this court duly given, made, and entered herein, appointed the administrator (or executor) of the estate of —, deceased, and thereafter duly qualified by taking the oath of office and giving a bond, with — and — as sureties;

2. That —, one of the sureties on said bond, is insolvent (or is becoming insolvent, or has removed, or is about to remove, from the state, or state any other cause by reason of which the bond is insufficient);

3. That by reason of the premises hereinbefore stated, the bond of said administrator (or executor) is insufficient;

4. That your petitioner is a person interested in said estate, being a creditor thereof (or heir at law, or legatee, or devisee of said deceased, as the case may be);

5. Your petitioner also represents that said administrator is wasting the property of said estate by engaging in useless and expensive litigation with the creditors of said deceased, etc.; —

Wherefore petitioner prays that a citation issue directed to said administrator (or executor) requiring him to show cause, if

any he can, why he should not give further security, and in the mean time that his powers as such administrator (or executor) be suspended. —, Petitioner.

—, Attorney for Petitioner.

State of —, }
County of —. } ss.

—, being duly sworn, deposes and says that he has read the foregoing petition, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters, that he believes it to be true. —

Subscribed and sworn to before me this — day of —, A. D. 18—. —, Notary Public.

§ 81. [1398.] Citation to Executor, etc.—If the court, or a judge thereof, is satisfied that the matter requires investigation, a citation must be issued to the executor or administrator, requiring him to appear, at a time and place to be therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator at least five days before the return day. If he has absconded or cannot be found, it may be served by leaving a copy of it at his place of residence, or by such publication as the court, or a judge thereof, may order.

Arizona.—Same. Rev. Stats., sec. 1045.

Idaho.—Same. Rev. Stats., sec. 5381.

Montana.—Same. Comp. Stats., p. 294, sec. 85.

Nevada.—Same, except that the words “or by such publication as the court, or a judge thereof, may order” are omitted. Gen. Stats., sec. 2748.

Utah.—Same as California. Comp. Laws, sec. 4065.

Washington.—Same as California. Code Proc., sec. 917.

Wyoming.—Same as California, except that a “commissioner” may also act. Laws 1890-91, p. 258, sec. 11.

Citation: See §§ 317-321, *post*.

Form No. 56.—Order for Citation to Administrator (or Executor), when Sureties are Insufficient.

[Title of Court and Estate.]

It having come to my knowledge (by the allegations of the petition of —, or by the affidavit of —) that the sureties upon the bond of —, the administrator of the estate of —,

deceased, have become insolvent, and that said administrator is wasting said estate, and being satisfied that the matter requires investigation; —

It is ordered that a citation issue to said administrator, requiring him to show cause, if any he can, on the — day of —, A. D. 18—, at — o'clock, A. M., before the above-entitled court, why he should not give further security; and it is further ordered that his powers as administrator be suspended until the further order of this court.

Dated —, 18—. —, Judge of the — Court.

NOTE. — In case the order is made by the court on its motion, the words in parentheses are to be omitted.

Form No. 57. — Citation to Administrator (or Executor), when Sureties are Insufficient.

[Title of Court and Estate.]

To —, administrator of the estate of —, deceased.

You are hereby cited to appear on the —, day of —, A. D. 18—, at ten o'clock, A. M., before the above-named court, and show cause why you should not be required to give further security, inasmuch as it has been alleged (or has come to the knowledge of the court) that the sureties on your bond as administrator of the said estate are insolvent.

[SEAL]

—, Clerk.

§ 82. [1399.] Further Security may be Ordered.

— On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security is, from any cause, insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond in the usual form within a reasonable time, not less than five days.

Arizona. — Same. Rev. Stats., sec. 1046.

Idaho. — Same. Rev. Stats., sec. 5382.

Montana. — Same. Comp. Stats., p. 294, sec. 86.

Nevada. — Same. Gen. Stats., sec. 2749.

Utah. — Same. Comp. Laws, sec. 4066.

Washington. — Same. Code Proc., sec. 918.

Wyoming. — Same, except that court, judge, or commissioner may act. Laws 1890-91, p. 258, sec. 12.

Additional bondsmen are responsible for the faithful execution by the executor or administrator of the duties of his trust; without regard to the time of the execution of the bond: *Lucoste v. Splivalo*, 64 Cal. 35.

Form No. 58. — Order Requiring Administrator (or Executor) to Give Further Security.

[Title of Court and Estate.]

The citation heretofore issued herein, requiring the administrator (or executor) to show cause why he should not give further security as administrator (or executor) herein, having been duly served and returned, and the said administrator (or executor), —, having this day appeared before me at the time and place named in said citation, and the court having heard the allegations and the proofs of the parties, and it appearing that —, one of the sureties on the bond of the said administrator (or executor), is solvent, and amply sufficient, and it appearing that —, the other surety on said bond, is insolvent;—

It is ordered that the said administrator (or executor) give further security within five days, in the sum specified in the bond already given in the place of said insolvent surety, to be approved by the judge of this court (or that said administrator (or executor) file a new bond within five days, in the form prescribed by law in the sum of — dollars, with sureties approved by the judge of this court.)

Dated —.

—, Judge of the — Court.

§ 83. [1400.] Neglecting to Obey Order.—If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease.

Arizona. — Same. Rev. Stats., sec. 1047.

Idaho. — Same. Rev. Stats., sec. 5383.

Montana. — Same. Comp. Stats., p. 295, sec. 87.

Nevada. — Same. Gen. Stats., sec. 2750. See § 121, *post*.

Oregon. — “When a new undertaking is ordered, if the executor or administrator fail to comply therewith within five days from the entry thereof, or such further time as the order may prescribe, thenceforward the authority of such executor or administrator shall cease, and he shall be deemed removed, and his letters revoked.” Hill’s Laws, sec. 1097.

Utah. — Same as California. Comp. Laws, sec. 4067.

Washington. — Same as California. Code Proc., sec. 919.

Wyoming.—Same as California, except that court, judge, or commissioner may act. Laws 1890-91, p. 258, sec. 13.

See *Levy v. Riley*, 4 Or. 393.

Form No. 59.—Order Revoking Letters on Failure of Administrator (or Executor) to Give Further Security.

[Title of Court and Estate.]

An order having been given, made, and entered herein on the — day of —, A. D. 18—, requiring —, the administrator (or executor) of the above-named estate, to give further security on his bond as such administrator (or executor) within five days, and said five days having fully expired, and said administrator (or executor) having failed to file such security,—

It is hereby ordered that his letters of administration (or letters testamentary) be and the same are hereby revoked.

Dated —, 18—. —, Judge of the — Court.

§ 84. [1401.] Suspending Powers of Executor, etc.—When a petition is presented praying that an executor or administrator be required to give further security, or to give bond, where, by the terms of the will, no bond was originally required, and it is alleged, on oath, that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined.

Arizona.—Same. Rev. Stats., sec. 1048.

Idaho.—Same. Rev. Stats., sec. 5384.

Montana.—Same. Comp. Stats., p. 295, sec. 88.

Nevada.—Same, except that the following is omitted: "Or to give bond where, by the terms of the will, no bond was originally required." Gen. Stats., sec. 2751.

Utah.—Same as California. Comp. Laws, sec. 4068.

Wyoming.—Same as California, except that commissioner may also act. Laws 1890-91, p. 258, sec. 14.

NOTE.—For form of order under this section, see Form No. 71, § 109, *post*.

This section is not in conflict *dure*, section 1396 (§ 79, *ante*): *In re White*, 53 Cal. 19.

§ 85. [1402.] Further Security Ordered.—When it comes to his knowledge that the bond of any executor or administrator is, from any cause, insufficient, the judge, without

any application, must cause him to be cited to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested.

Arizona. — Same. Rev. Stats., sec. 1049.

Idaho. — Same. Rev. Stats., sec. 5385.

Montana. — Same. Comp. Stats., p. 295, sec. 89.

Nevada. — Same. Gen. Stats., sec. 2752.

Utah. — Same. Comp. Laws, sec. 4069.

Washington. — Same. Code Proc., sec. 920.

Wyoming. — Same, except that commissioner may also act. Laws 1890-91, p. 258, sec. 15.

§ 86. [1403.] **Release of Sureties.** — When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application to the superior court or a judge thereof for relief. The court or judge must cause a citation to the executor or administrator to be issued, and served personally, requiring him to appear at a time and place to be therein specified, and to give other security. If he has absconded, left, or removed from the state, or if he cannot be found after due diligence and inquiry, service may be made as provided in section thirteen hundred and ninety-eight.

For section 1398, *supra*, see § 81, *ante*.

Citation: See §§ 317-321, *post*.

Arizona. — Same. Rev. Stats., sec. 1050.

Idaho. — Same. Rev. Stats., sec. 5386.

Montana. — Same. Comp. Stats., p. 295, sec. 90.

Nevada. — Same; last sentence omitted. Gen. Stats., sec. 2753.

Utah. — Same. Comp. Laws, sec. 4070.

Wyoming. — Same, except that commissioner may also act. Laws 1890-91, p. 258, sec. 16.

Form No. 60. — Petition of Surety to be Released.

[Caption, Form 1, § 5, *ante*.]

1. That petitioner is one of the sureties on the bond of —, the administrator, given by him heretofore on qualifying as administrator (or executor) of the estate of —, deceased, and which bond has been duly filed and recorded in this court, and is now in force;

2. That petitioner desires to be released from said bond, and from all responsibility on account of the future acts of said administrator (or executor); —

Wherefore petitioner prays that a citation be issued herein,

directed to said administrator (or executor), requiring him to give other security, and that petitioner be released from further liability on account of said bond. —, Petitioner.

—, Attorney for Petitioner.

Form No. 61.—Order for Citation on Petition of Surety to be Released.

[Title of Court and Estate.]

—, one of the sureties on the bond of —, the administrator (or executor) of the estate of —, deceased, having filed his petition to be released from responsibility on account of the future acts of said administrator;—

It is ordered that a citation issue to said administrator (or executor), directing him to appear before me at chambers on the — of —, A. D. 18—, at the hour of — o'clock, A. M., and give other security. —, Judge of the — Court.

Dated —, 18—.

NOTE.—The citation to be issued in accordance with the above order should be the same as Form No. 57, § 81, *ante*, being varied in the slight particulars to correspond with the above order.

§ 87. [1404.] **Order Relieving Sureties.**—If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default, or misconduct of the executor or administrator.

Arizona.—Same. Rev. Stats., sec. 1051.

Idaho.—Same. Rev. Stats., sec. 5387.

Montana.—Same. Comp. Stats., p. 295, sec. 91.

Nevada.—Same. Gen. Stats., sec. 2754.

Oregon.—“Such new undertaking, when given and received, shall discharge the sureties in the former undertaking from any liabilities on account of their principal, arising from his acts or omissions subsequent thereto.” Hill's Laws, sec. 1097.

Utah.—Same as California. Comp. Laws, sec. 4071.

Wyoming.—Same as California, except that commissioner may also act. Laws 1890-91, p. 259, sec. 17.

Form No. 62.—Order Releasing Surety.

[Title of Court and Estate.]

—, the administrator (or executor) of the estate of —, deceased, having given new sureties to the satisfaction of the

judge of this court on the application of —, one of his former sureties, to be released, the said —, his former surety, is released from liability on his bond for any subsequent act, default, or misconduct of said administrator.

Dated —, 18—. —, Judge of the — Court.

§ 88. [1405.] Neglect to Give New Sureties.—If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the court or judge must, by order, revoke his letters.

Arizona.—Same. Rev. Stats., sec. 1052.

Idaho.—Same. Rev. Stats., sec. 5388.

Montana.—Same. Comp. Stats., p. 295, sec. 92.

Nevada.—Same. Gen. Stats., sec. 2755.

Utah.—Same. Comp. Laws, sec. 4072.

Wyoming.—Same, except that commissioner may also act. Laws 1890-91, p. 259, sec. 18.

Form No. 63. — Order Revoking Letters on Failure to Give New Sureties.

[Title of Court and Estate.]

—, one of the sureties on the bond of —, administrator (or executor) of the estate of —, deceased, having petitioned to be released from liability on account of the future acts of said administrator, and said administrator having been duly cited to appear before me in chambers on the — day of —, A. D. 18—, at the hour of — o'clock, A. M., to give new security, and the said administrator having failed to give such new security at the time and place mentioned in said citation, and having been granted ten days' additional time within which to file such security, and said time having fully expired, and said administrator having not yet given such new security, —

It is ordered that his letters of administration (or letters testamentary) be revoked.

Dated —, 18—. —, Judge of the — Court.

§ 89. [1406.] Applications to be Determined when.

—The applications authorized by the nine preceding sections of this chapter may be heard and determined at any time. All orders made therein must be entered upon the minutes of the court.

Arizona. — Same. Rev. Stats., sec. 1053.

Idaho. — Same. Rev. Stats., sec. 5389.

Montana. — Same. Comp. Stats., p. 295, sec. 93.

Nevada. — Same. Gen. Stats., sec. 2756.

Utah. — Same. Comp. Laws, sec. 4073.

Washington. — “The applications and acts authorized by the foregoing sections of this chapter may be heard and determined in court or at chambers. All orders made therein must be entered upon the minutes of the court.” Code Proc., sec. 925.

Wyoming. — Same as California. Laws 1890-91, p. 259, sec. 19.

§ 90. [1407.] Sureties' Liability. — The liability of principal and sureties upon the bond of any executor, administrator, or guardian is in all cases to pay in the kind of money or currency in which the principal is legally liable.

Arizona. — Same. Rev. Stats., sec. 1054.

Montana. — Same. Comp. Stats., p. 296, sec. 94.

Utah. — Same. Comp. Laws, sec. 4074.

ARTICLE VII.

SPECIAL ADMINISTRATORS, AND THEIR POWERS AND DUTIES.

§ 91. Special administrator, when appointed.

§ 92. Special letters may be issued at any time.

§ 93. Preference given to persons entitled to letters.

§ 94. Special administrator to give bond and take oath.

§ 95. Duties of special administrator.

§ 96. When letters testamentary or of administration are granted, special administrator's powers cease.

§ 97. Special administrator to render account.

§ 91. [1411.] Special Administrator. — When there is delay in granting letters testamentary or of administration, from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an executor or administrator dies, or is suspended or removed, the superior court, or a judge thereof, must appoint a special administrator to collect and take charge of the estate of the decedent, in whatever county or

counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate; or he may direct the public administrator of his county to take charge of the estate.

This may be done at chambers: See next section.

Arizona. — Same. Rev. Stats., sec. 1055.

Idaho. — Same. Rev. Stats., sec. 5390.

Montana. — Same. Comp. Stats., p. 296, sec. 95.

Nevada. — Same. Gen. Stats., secs. 2757, 2764.

Oregon. — "When for any reason there shall be delay in issuing letters testamentary or of administration, and the property of the deceased is in danger of being lost, injured, or depreciated, the court, or judge thereof, may appoint a special administrator to take charge of the estate, who shall qualify in like manner, and have the powers and perform the duties of an administrator generally, except that he is not authorized to pay the debts of or otherwise discharge any obligation against the deceased. Upon the issuing of letters testamentary or of administration, the powers of the special administrator cease." Rev. Stats., sec. 1091.

Utah. — Same as California, except last clause is omitted; also, "or a judge thereof" omitted. Comp. Laws, sec. 4075.

Washington. — "When by reason of an action concerning the proof of a will, or from any other cause, there shall be a delay in granting letters testamentary or of administration, the judge may, in his discretion, appoint a special administrator (other than one of the parties) to collect and preserve the effects of the deceased; and in case of an appeal from the decree appointing such special administrator, he shall, nevertheless, proceed in the execution of his trust, until he shall be otherwise ordered by the appellate court." Code Proc., sec. 931.

Wyoming. — Same as California, except that the last clause is omitted, and that a clerk or commissioner may also act. Laws 1890-91, p. 259, sec. 1.

Corporations may be Administrator: See §§ 39, 76, *ante*.

A special administrator cannot be appointed by the court if the executor of decedent has never been suspended or removed. A simple order appointing a special administrator will not operate as a removal of the executor, if the latter has never been cited to appear and has never appeared to show cause why the letters should not be revoked: *Schroeder v. Superior Court*, 70 Cal. 343.

An appeal from an order revoking the probate of a will does not revive the powers and functions of a former executor. The court should appoint a special administrator to take charge of the estate pending the appeal: *In re Crozier*, 65 Cal. 332.

Form No. 64.—Petition for the Appointment of a Special Administrator.

[Caption, Form 1, § 5, *ante*.]

(Follow Form No. 44 to subd. 7.)

7. That petitioner is the public administrator of said ——— county of ———;

8. That there has been great delay in the granting of letters of administration upon said estate, and it is necessary that some one should be authorized to collect and preserve the property of said estate; —

Wherefore your petitioner prays that he be appointed special administrator of said estate to collect and take charge of the estate of said decedent.

—, Petitioner.

—, Attorney for Petitioner.

NOTE. — A special administrator may be appointed by the court upon its own motion and without the filing of a petition. Such letters may be granted to any qualified person upon the happening of the contingencies mentioned in said section. The manner of making the appointment and entering the order is specified in §§ 92, 93, *post*, which also direct to whom preference shall be given.

§ 92. [1412.] Special Letters may be Issued at Any Time. — The appointment may be made at any time, and without notice, and must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the clerk must issue letters of administration to such person, in conformity with the order.

Oath and Bond. See §§ 70-90, *ante*.

Arizona. — Same. Rev. Stats., sec. 1056.

Idaho. — Same. Rev. Stats., sec. 5391.

Montana. — Same. Comp. Stats., p. 296, sec. 96.

Nevada. — Same. Gen. Stats., sec. 2758. See also § 109, *post*.

Utah. — Same. Comp. Laws, sec. 4076.

Wyoming. — Same. Laws 1890-91, p. 259, sec. 2.

Appointment of special administrator shall specify the powers given him: must be entered upon the minutes of the court, and the order *In re Sackett*, 78 Cal. 300.

Form No. 65.—Order Appointing Special Administrator.

[Title of Court and Estate.]

It appearing that — died on the — day of —, A. D. 18—, and that at the time of his death he was a resident of the — county of —, state of —;

That he left estate, and that there is no one authorized to properly care for the same, and it is in imminent danger of being lost and destroyed;

That there has been great delay in granting letters of administration upon said estate, and it is necessary that some one should be authorized to collect and preserve the property of the same; —

It is therefore ordered that — be and he is hereby appointed special administrator of the estate of said decedent, with power to collect, take charge of, and preserve the property of said estate, and to do such other things in relation thereto as may from time to time be directed by this court.

Dated —, 18—. —, Judge of the — Court.

§ 93. [1413.] Preference Given.— In making the appointment of a special administrator, the court or judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment.

Letters of Administration, to Whom Granted: See §§ 51–56, *ante*.

Arizona. — Same. Rev. Stats., sec. 1057.

Idaho. — Same. Rev. Stats., sec. 5392.

Montana. — Same. Comp. Stats., p. 296, sec. 97.

Nevada. — Same. Gen. Stats., sec. 2759.

Utah. — Same to and including the word “administration”; balance omitted. Comp. Laws, sec. 4077.

Washington. — See section 931, under § 91, *ante*, as to appeals.

Wyoming. — Same as California, except that “officer” is substituted for “judge.” Laws 1890–91, p. 259, sec. 3.

An order appointing a special administrator is not appealable. Subdivision 3, section 963, Code of Civil Procedure, referring to certain appealable matters, reads thus: “From a judgment or order granting, refusing, or revoking letters testamentary, or of administration, or of guardianship.” Section 1413, Code of Civil Procedure, is as follows: “In making the appointment of a special administrator, the court or judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment.” In order, if possible, to harmonize the two sections of the code so that both may prove effective, it would seem as if the legislative mind,

in passing the first section, was directed towards orders appointing general administrators, and did not have in view such orders as regards special administrators, and that the last section was enacted for the purpose of supplying a rule of action in the appointment of such administrators as those last mentioned. It is presumable that this court, in delivering the opinion in the case of *Estate of Crozier*, 65 Cal. 334, did not have under consideration the exact question which is here involved, and did not intend thereby to pass upon it, having there no cause to determine the force and effect of the two sections of the code, *supra*, taken together: *In re Carpenter*, 73 Cal. 202.

§ 94. [1414.] Bond and Oath.— Before any letters issue to any special administrator, he must give bond in such sum as

the court or judge may direct, with sureties to the satisfaction of the court or judge, conditioned for the faithful performance of his duties; and he must take the usual oath, and have the same indorsed on his letters.

Oath and Bond: See §§ 70-90, *ante*.

Arizona.—Same. Rev. Stats., sec. 1058.

Idaho.—Same. Rev. Stats., sec. 5393.

Montana.—Same. Comp. Stats., p. 296, sec. 98.

Nevada.—Same; last clause omitted. Gen. Stats., sec. 2760.

Utah.—Same. Comp. Laws, sec. 4078.

Washington.—“Every such administrator shall, before entering on the duties of his trust, give bond, with sufficient surety or sureties, in such sum as the judge shall order, payable to the state of Washington, with condition as required of an executor, or in other cases of administration, to make and return into court as soon as practicable a true inventory of the goods, chattels, rights, and credits of the deceased which have or shall come into his possession or knowledge; and that he will truly account for all the goods, chattels, debts, and effects of the deceased that shall be received by him as special administrator, whenever required by the court, and will deliver the same to the person who shall be appointed executor or administrator of the deceased, or to such other person as shall be lawfully authorized to receive the same.” Code Proc., sec. 932.

Wyoming.—Same as California, except that “officer” is substituted for “judge.” Laws 1890-91, p. 259, sec. 4.

§ 95. [1415.] To Preserve Estate.—The special administrator must collect and preserve for the executor or administrator all the goods, chattels, debts, and effects of the decedent, all incomes, rents, issues, and profits, claims and demands of the estate; must take the charge and management of, enter upon, and preserve from damage, waste, and injury, the real estate; and for any such and all necessary purposes may commence and maintain, or defend, suits and other legal proceedings as an administrator; he may sell such perishable property as the court may order to be sold, and exercise such other powers as are conferred upon him by his appointment; but in no case is he liable to an action by any creditor on a claim against the decedent.

Arizona.—Same. Rev. Stats., sec. 1059.

Idaho.—Same. Rev. Stats., sec. 5394.

Montana.—Same. Comp. Stats., p. 296, sec. 99.

Nevada.—Same. Gen. Stats., sec. 2761.

Utah.—Same. Comp. Laws, sec. 4079.

Washington. — "Such special administrator shall collect all the goods, chattels, and debts of the deceased, and preserve the same for the executor or administrator who shall thereafter be appointed; and for that purpose may commence and maintain suits as an administrator, and may also sell such perishable and other goods as the court shall order sold, and he shall be allowed such compensation for his service as the said court shall deem reasonable." Code Proc., sec. 933.

"Such special administrator shall not be liable to an action by any creditor of the deceased." Code Proc., sec. 935.

Wyoming. — Same as California, except that in the tenth line, after "court," the words "or officer" are inserted." Laws 1890-91, p. 260, sec. 5.

Sale by a special administrator, as such, without authority, of property pledged to his decedent during his lifetime as security for a loan, is not a conversion by the estate so as to enable the pledgor to recover the enhanced value of the property, in an action of trover against the executors subsequently appointed, although they received the proceeds of the sale: *Von Schmilt v. Bourn*, 50 Cal. 616.

Special administrator has no power to pay claims against an estate: *In re Sackett*, 78 Cal. 300.

The duties of a special administrator are similar to those of a receiver in equity, the powers and duties of each being limited to such as are defined by statute, or expressed in the order of his appointment, or in such order as he may from time to time receive for the purpose of more effectually preserving the estate intrusted to his charge: *In re Moore*, 88 Cal. 1.

Though it is matter of prudence

to obtain a previous order for necessary expenditures, there is no rule of law which will deprive the court of power to reimburse a special administrator or receiver, if his acts and expenditures are approved: *In re Moore*, 88 Cal. 1.

The payment by a special administrator, for repairs to the estate, of a sum in excess of the amount allowed by a previous order of the court to be expended therefor, and for repairs not previously authorized, should not be disallowed in the settlement of his account merely because of such excess of power, if it appear that the repairs were necessary and the expenditure reasonable: *In re Moore*, 88 Cal. 1.

The approval of the account of the special administrator in respect to expenditures for necessary repairs is in the discretion of the judge settling the account, and is not subject to review, unless it appears that the discretion has been abused: *In re Moore*, 88 Cal. 1.

§ 96. [1416.] When Special Administrator's Powers Cease. — When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands; and the executor or administrator may prosecute to final judgment any suit commenced by the special administrator.

Arizona. — Same. Rev. Stats., sec. 1060.

Idaho. — Same. Rev. Stats., sec. 5395.

Montana. — Same. Comp. Stats., p. 297, sec. 100.

Nevada. — Same. Gen. Stats., sec. 2762.

Utah. — Same. Comp. Laws, sec. 4080.

Washington. — Same. Code Proc., sec. 934.

Wyoming. — Same. Laws 1890-91, p. 260, sec. 6.

§ 97. [1417.] Account to be Rendered. — The special administrator must render an account, on oath, of his proceedings, in like manner as other administrators are required to do.

Account: See §§ 253 et seq., *post*.

Arizona. — Same. Rev. Stats., sec. 1061.

Idaho. — Same. Rev. Stats., sec. 5396.

Montana. — Same. Comp. Stats., p. 297, sec. 101.

Nevada. — Same. Gen. Stats., sec. 2763.

“Whenever an executor or administrator shall die, or his letters be revoked, and the circumstances of the estate require the immediate appointment of an administrator, the probate judge may appoint a special administrator, as provided in the preceding sections.” Gen. Stats., sec. 2764.

Utah. — Same as California. Comp. Laws, sec. 4081.

Washington. — Same as California. Code Proc., sec. 936.

Wyoming. — Same as California. Laws 1890-91, p. 260, sec. 7.

The compensation of a special administrator is in the discretion of the court, and it is not improper for the court to take the rate of compensation fixed by the statute for an administrator as the standard for determining a proper allowance to be made to him: *In re Moore*, 88 Cal. 2.

ARTICLE VIII.

WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANTED, AND MISCELLANEOUS PROVISIONS.

§ 98. On proof of will, after grant of letters of administration, letters revoked.

§ 99. Power of executor in such a case.

§ 100. Remaining administrator or executor to continue when his colleagues are disqualified.

§ 101. Who to act when all acting are incompetent.

§ 102. Executor or administrator may resign when — Court to appoint successor — Liability of outgoer.

§ 103. All acts of executor, etc., valid until his power is revoked.

§ 104. Transcript of court minutes to be evidence.

§ 98. [1423.] Revocation of Letters. — If, after granting letters of administration on the ground of intestacy, a will of the decedent is duly proved and allowed by the court, the letters of administration must be revoked, and the power of the administrator ceases, and he must render an account of his administration within such time as the court shall direct.

Arizona. — Same. Rev. Stats., sec. 1062.

Idaho. — Same. Rev. Stats., sec. 5397.

Montana. — Same. Comp. Stats., p. 297, sec. 102.

Nevada. — Same. Gen. Stats., sec. 2767. See § 121, *post*.

Oregon. — “If, after administration has been granted upon an estate, a will of the deceased be found and proven, the letters of administration shall be revoked, and letters testamentary or of administration with the will annexed shall be issued.” Hill’s Laws, sec. 1093.

Utah. — Same as California. Comp. Laws, sec. 4082.

Washington. — Same as Oregon. Code Proc., sec. 887.

Wyoming. — Same as California. Laws 1890–91, p. 260, sec. 1.

Accounts: See §§ 253 et seq., *post*.

If an administrator of an estate is appointed and qualifies, and afterwards, without removing him, the court admits a will to probate, and appoints another person administrator

with the will annexed, the latter appointment supersedes the former: *McCaughey v. Harvey*, 49 Cal. 497. *Contra*, see *Haynes v. Meeks*, 20 Cal. 288.

· § 99. [1424.] **Power of Executor in Such a Case.** — In such case the executor or the administrator with the will annexed is entitled to demand, sue for, recover, and collect all the rights, goods, chattels, debts, and effects of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration.

Arizona. — Same. Rev. Stats., sec. 1063.

Idaho. — Same. Rev. Stats., sec. 5398.

Montana. — Same. Comp. Stats., p. 297, sec. 103.

Nevada. — Same. Gen. Stats., sec. 2768.

Utah. — Same. Comp. Laws, sec. 4083.

Wyoming. — Same. Laws 1890–91, p. 260, sec. 2.

§ 100. [1425.] **Joint Administrators, etc.** — In case any one of several executors or administrators to whom letters are granted dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust, or in case the letters testamentary or of administration are revoked or annulled with respect to any one executor or administrator, the remaining executor or administrator must proceed to complete the execution of the will or administration.

Arizona. — Same. Rev. Stats., sec. 1064.

Idaho. — Same. Rev. Stats., sec. 5399.

Montana. — Same. Comp. Stats., p. 297, sec. 104.

Nevada. — Same. Gen. Stats., sec. 2765.

• **Oregon.** — “Whenever an executor or administrator shall die, resign, or be removed, if there be a co-executor or administrator, he shall thenceforward exercise the powers and perform the duties of the trust.” Hill’s Laws, sec. 1098.

“The surviving or remaining executor or administrator, or the new administrator, as the case may be, is entitled to the exclusive administration of the estate, and for that purpose may maintain any necessary and proper action, suit, or proceeding on account thereof against the executor or administrator ceasing to act, or against his sureties or representatives.” Hill’s Laws, sec. 1099.

Utah. — Same as California. Comp. Laws, sec. 4084.

Washington. — “When any person to whom letters testamentary or of administration have been issued becomes disqualified to act, because of leaving the state, becoming of unsound mind, or is convicted of any crime or misdemeanor involving moral turpitude, or if a woman and she ceases to be single, the court having jurisdiction shall revoke his or her letters as in this act provided. Code Proc., sec. 954.

“If there be more than one executor or administrator of an estate, and the letters to part of them be revoked or surrendered, or a part die, or in any way become disqualified, those who remain shall perform all the duties required by law.” Code Proc., sec. 939.

Wyoming. — Same as California. Laws, 1890–91, p. 260, sec. 3.

§ 101. [1426.] Administration under Will. — If all such executors or administrators die or become incapable, or the power and authority of all of them is revoked, the court must issue letters of administration with the will annexed, or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions, as hereinbefore required of administrators, and shall have the like power and authority.

Arizona. — Same. Rev. Stats., sec. 1065.

Idaho. — Same. Rev. Stats., sec. 5400.

Montana. — Same. Comp. Stats., p. 297, sec. 105.

Nevada. — Same. Gen. Stats., sec. 2766. See § 121, *post*.

Oregon. — “And if all the executors or administrators shall die, resign, or be removed, administration of the estate remaining unadministered shall be granted to those next entitled, if they be competent and qualified.” Hill’s Laws, sec. 1098. See also Hill’s Laws, sec. 1099, under last section.

Utah. — Same as California. Comp. Laws, sec. 4085.

Washington. — “If the executor or administrator of an estate shall die, resign, or the letters be revoked before the settlement of the estate, letters of administration of the goods remaining unadministered shall be granted to those

to whom administration would have been granted if the original letters had not been obtained, or the person obtaining them had renounced administration, and the administrator *de bonis non* shall perform the like duties and incur the like liabilities as the former executors or administrators." Code Proc., sec. 940.

"If an executor or administrator become of unsound mind, or be convicted of felony or infamous crime, or become an habitual drunkard, or otherwise incapable of or unsuitable for executing the trust reposed in him, or so fail to discharge his official duties, or waste or mismanage the estate, or so act as to endanger any co-executor or co-administrator, the probate court, upon complaint in writing made by any person interested, supported by affidavit and due notice given to the person complained of, shall hear the complaint, and if found to be just, shall revoke the letters granted." Code Proc., sec. 890.

Wyoming.—Same as California. Laws 1890-91, p. 161, sec. 4.

Administrator with Will Annexed: See §§ 41, 44, 47, *ante*.

Oath and Bond: See §§ 70-90, *ante*.

An entire vacancy is not created in the administration of an estate by the commitment of the administrator to an insane asylum, but the administrator is incapable of executing his trust during such commitment. When, however, his incapacity has been removed, and he again enters upon the discharge of his duties, a petition comes too late which asks for

the appointment of another person on account of the administrator's former incapacity: *In re Moore*, 68 Cal. 281.

The administrator having been confined in an insane asylum for a time during the administration, a ruling admitting in evidence his certificate of discharge from the asylum held not prejudicial error: *In re Moore*, 68 Cal. 281.

§ 102. [1427.] **Resignation.**—Any executor or administrator may at any time, by writing filed in the superior court, resign his appointment, having first settled his accounts and delivered up all the estate to the person whom the court shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivery up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released, or affected by such appointment or resignation.

Arizona.—Same. Rev. Stats., sec. 1066.

Idaho.—Same. Rev. Stats., sec. 5401.

Montana. — Same. Comp. Stats., p. 298, sec. 106.

Nevada. — Same as first sentence of California. Gen. Stats., sec. 2769

Oregon. — "The court, or judge thereof, in its discretion, may allow an executor or administrator to resign, when it appears that such executor or administrator has published a notice of his intention to apply therefor in some newspaper in general circulation in the county, for the period of four weeks prior to such application, and that he is not in default in any matter connected with the duties of his trust. Such executor or administrator shall pay the cost of the proceeding, and if the application is allowed, he shall surrender his letters to be canceled, and his powers as such shall cease from that time forward." Hill's Laws, sec. 1111.

Utah. — Same as California. Comp. Laws, sec. 4086.

Washington. — "If any executor or administrator, having first settled his accounts, shall publish for six weeks, in some newspaper in this state in general circulation in the county wherein his letters were granted, a notice of his intention to apply to the court to resign his letters, and the court, on proof of such publication, believe that he should be permitted to resign, it shall so order." Code Proc., sec. 937.

"Such person shall then surrender his letters, his power from that time shall cease, and he shall pay the expense of publication and of all the proceedings on such application." Code Proc., sec. 938.

"If any executor or administrator resign, or his letters be revoked, or he die, he, or his representatives, shall account for, pay, and deliver to his successor, or to the surviving or remaining executor or administrator, all money and property of every kind, and all rights, credits, deeds, evidences of debt, and papers of every kind of the deceased, at such time and in such manner as the court shall order, on final settlement with such executor or administrator, or his legal representatives." Code Proc., sec. 941.

"The succeeding administrator, or remaining executor or administrator, may proceed by law against any delinquent former executor or administrator, or his personal representatives, or the sureties of either, or against any other person possessed of any part of the estate." Code Proc., sec. 942.

"All actions against sureties shall be commenced within six years after the revocation or surrender of letters of administration, or death of the principal." Code Proc., sec. 943.

Wyoming. — Same as California, except that last sentence is omitted, and in lieu thereof the following is inserted: "The executor or administrator so as aforesaid discharged and released, and the sureties on his bonds, shall not be responsible for any act or liability incurred after his said discharge; *provided*, that nothing herein shall be construed to relieve such executor or administrator or his sureties for any liability occurring on his bonds prior to his discharge." Laws 1890-91, p. 261, sec. 5.

When an administrator resigns, the court must appoint another, unless the estate is in a condition for distribution. The judge cannot order the money to be paid into court: *Wilson v. Hernandez*, 5 Cal. 443.

Administrator cannot resign without first settling up his accounts, and delivering over the estate to his successor: *Haynes v. Meeks*, 10 Cal. 110; 20 Cal. 310.

But should the court accept his

resignation, such acceptance is not void; it is only a voidable error: *Haynes v. Meeks*, 10 Cal. 110; 20 Cal. 310.

The acceptance by the court of the resignation of administrator is established by the appointment of his successor: *Haynes v. Meeks*, 10 Cal. 110; 20 Cal. 310.

In a collateral attack upon an order accepting an administrator's resignation, the presumption is, that the order was properly made, and that the administrator had settled his accounts and delivered up all the estate to some person appointed by the court: *Lucas v. Todd*, 28 Cal. 182.

When record of court shows resignation of former administrator, and the settlement of his final account, and the appointment of a new administrator after the date of such settlement, it must be presumed in favor of the action of the court that the former administrator delivered the assets into the custody of the court, or

to a person appointed to receive it, in the absence of evidence to the contrary, and that all conditions existed which were necessary to authorize the new appointment. The action of the court was equivalent to an acceptance of the resignation of the former administrator, and the revocation of his letters: *Jennings v. Le Breton*, 80 Cal. 8.

The powers and functions of a former executor are not revived upon the taking of an appeal from an order revoking the probate of a will. A special administrator should be appointed pending the appeal: *In re Crozier*, 65 Cal. 332.

An administrator may resign without notice by consent of the court: *Ramp v. McDaniel*, 12 Or. 108.

An administrator cannot of his own volition terminate his trust; he must first comply with the requirements of the statute before he can resign, or before the court can accept such resignation: *Ramp v. McDaniel*, 12 Or. 114.

Form No. 66.—Notice of Intention to Resign.

(Used in Oregon and Washington only.)

Notice is hereby given by the undersigned, — of the estate of —, deceased, that he will, at the opening of court on the — day of —, A. D. 18—, or as soon thereafter as he can be heard, tender his resignation as such — to the probate (in Oregon, county) court of the county of —, state of —, at which time all persons interested in said estate may appear and file objections to the acceptance of the same.

—, Administrator (or executor) of the Estate of —, Deceased.

Form No. 67.—Resignation of Administrator (or Executor).

[Title of Court and Estate.]

To the Hon. — Court of the — County of —, State of —.

— hereby tenders his resignation as — of the estate of —, deceased.

Dated —.

§ 103. [1428.] Acts of Executor Valid.—All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid, to all intents and purposes, as if such executor or administrator had continued lawfully to execute the duties of his trust.

Arizona.—Same. Rev. Stats., sec. 1067.

Idaho.—Same. Rev. Stats., sec. 5402.

Montana.—Same. Comp. Stats., p. 298, sec. 107.

Nevada.—Same. Gen. Stats., sec. 2770.

Utah.—Same. Comp. Laws, sec. 4087.

Wyoming.—Same. Laws 1890-91, p. 261, sec. 6.

An executor *de son tort*, though his acts are for many purposes valid, cannot derive any benefit to himself from them. He cannot retain assets to pay a debt due him, and if the estate is insolvent, he cannot defend against an action to recover the assets that he has expended or their value in paying debts of the deceased: *De la Guerra v. Packard*, 17 Cal. 183.

There is no such officer as executor *de son tort* recognized under the California probate practice: *Bowden v. Pierce*, 73 Cal. 459; *Pryor v. Downey*,

50 Cal. 399, 400; *Rutherford v. Thompson*, 14 Or. 236.

Where widow sues an executor *de son tort* as administratrix to recover from defendant for the conversion by him of property of the estate, he may show in evidence that he acted under the direction of widow before she was appointed administratrix, and that the proceeds of the property were used in payment of debts of the estate: *Rutherford v. Thompson*, 14 Or. 236.

§ 104. [1429.] Transcript of Minutes to be Evidence.—A transcript from the minutes of the court, showing the appointment of any person as executor or administrator, together with the certificate of the clerk, under his hand and the seal of his court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him, and have not been revoked, shall have the same effect in evidence as the letters themselves.

Arizona.—Same. Rev. Stats., sec. 1068.

Idaho.—Same. Rev. Stats., sec. 5403.

Montana.—Same. Comp. Stats., p. 298, sec. 108.

Nevada.—Same. Gen. Stats., sec. 2771.

Utah.—Same. Comp. Laws, sec. 4088.

Washington.—“Copies of such letters, or copies of the records thereof, certified by the clerk, and under the seal of the superior court, shall be received as evidence in any court in this state.” Code Proc., sec. 897.

Wyoming.—Same as California. Laws 1890-91, p. 261, sec. 7.

ARTICLE IX.

DISQUALIFICATION OF JUDGES AND TRANSFERS OF ADMINISTRATORS.

§ 105. When judge not to act.

§ 106. Judge being disqualified, proceedings to be transferred, and where.

§ 107. Transfer not to change right to administer — Retransfer, how made.

§ 108. When proceedings to be returned to original court.

§ 105. [1430.] **When Judge not to Act.** — No will shall be admitted to probate, or letters testamentary or of administration granted, before any judge who is interested, as next of kin to the decedent, or as a legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto, or is in any other manner interested or disqualified from acting.

Arizona. — Same. Rev. Stats., sec. 1069.

Idaho. — Same. Rev. Stats., sec. 5404.

Montana. — Same. Comp. Stats., p. 298, sec. 109. See Comp. Stats., p. 275, sec. 4, under § 1, *ante*.

Nevada. — Same, except that the following words are omitted: "Or is in any other manner interested or disqualified from acting." Gen. Stats., sec. 2772.

Utah. — Same as California. Comp. Laws, sec. 4089.

Wyoming. — Same as California, with the following added: "But the proceedings in relation to the granting of such letters and the settlement of the estate shall proceed in that court the same as in all other cases, and in the same manner, except whenever any order or decree, final or otherwise, which is required to be made by the judge of the court, he shall call in another of the district judges, as provided by law, to hear and determine the questions submitted, and make such orders as he shall deem necessary in relation to said estate." Laws 1890-91, p. 261, sec. 8.

Disqualification of Judge: Cal. Code Civ. Proc., sec. 170; Hill's Or. Code, sec. 913; Wash. Code Proc., sec. 34.

A judge is disqualified to act in a case in probate where his sons, who are attorneys at law, have a contingent or equitable interest in the property

of the estate in case the claim of their client is successful: *Howell v. Budd*, 91 Cal. 352, 353.

§ 106. [1431.] **Transfer of Proceedings.** — When a petition is filed in the superior court praying for admission to probate of a will, or for granting letters testamentary or of administration, or when proceedings are pending in the superior court for the settlement of an estate, and there is no judge of

said court qualified to act, an order must be made transferring the proceedings to the superior court of an adjoining county; and the clerk of the court ordering the transfer must transmit to the clerk of the court to which the proceedings are ordered to be transferred a certified copy of the order, and all papers on file in his office in the proceedings; and thereafter the court to which the proceeding is transferred shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction of the estate; provided, there shall not be any necessity for transferring such proceedings, or any of them, when a judge of some other county qualified to act attends at the request of the judge of the county where such proceedings are pending, to hold court, to conduct and to try such proceedings; and such judge, when so called upon to preside, shall exercise jurisdiction over any proceeding in the estate as is exercised in other cases under like circumstances. [Approved March 31, 1891; Cal. Stats. 1891, p. 435.]

Arizona. — Same, except that all is omitted from the word "estate," in fifteenth line, and "probate court" is substituted for "superior court." Rev. Stats., sec. 1070.

Idaho. — Same as Arizona. Rev. Stats., sec. 5405.

Montana. — Same as Arizona. Comp. Stats., p. 298, sec. 110.

Nevada. — "When any probate judge who would otherwise be authorized to act shall be precluded from acting from the causes mentioned in the preceding section, or when he shall be in any manner interested, upon a representation, and due proof thereof, to the probate judge of an adjoining county, such judge shall be vested with all the powers and authority of the proper probate judge, in relation to the proof of any will, and the granting of letters testamentary or of administration thereon, and the granting of letters of administration in cases of intestacy, and shall retain jurisdiction as to all subsequent proceedings in regard to the estate." Gen. Stats., sec. 2773.

Oregon. — "Any proceedings commenced in the county court, whether actions at law or proceedings in probate, in which the county judge is a party or directly interested, may be certified to the circuit court in and for the county in which proceeding may be pending, where the action at law shall be proceeded with as upon appeal from the county to the circuit court; if the matter be a matter in probate, then all of the original papers and the proceedings had shall be certified to the circuit court, and the judge of said circuit court shall proceed in the manner now prescribed for the county judge had the same remained in said court." Hill's Laws, sec. 898.

Utah. — Same as Arizona. Comp. Laws, sec. 4090.

Probate cases are not civil matters within the meaning of the (old) Practice Act, so as to transfer them from one county to another: *In re Scott*, 15 Cal. 220.

The subject of change of place of trial is treated of in California Code of Civil Procedure, sections 396-400.

Where jurisdiction exists in one county, and letters are there issued, the proceedings cannot be transferred into another county on the ground that the widow and the witnesses resided in the other county,

and that the interest of the persons representing the estate would be advanced: *In re Scott*, 15 Cal. 220.

The probate court can change the place of trial of an issue of fact to another probate court, and in such case the clerk of the court to which the case is sent can certify a transcript of the proceedings and result of the trial back, and the court from which the case was sent can enter the appropriate judgment: *People v. Atmy*, 46 Cal. 246.

Form No. 68.—Order Transferring Proceedings.

[Title of Court and Estate.]

It appearing that a petition has been filed in this court praying for admission to probate of the will of —, deceased, and that letters testamentary be granted thereon to —, the person named therein as executor (for letters of administration upon the estate of —, deceased, or it appearing that proceedings are pending in this court for the settlement of the estate of —, deceased), and that there is no judge of this court qualified to act in the matter of said estate, for the reason that they are next of kin to said decedent; —

It is therefore ordered that the proceedings in the matter of said estate be transferred to the superior court of the county of Yolo, California, that being an adjoining county, and the clerk of this court is hereby ordered and directed to transmit to the clerk of said court a certified copy of this order, and all papers on file in his office relating to said estate.

Dated —.

—, Judge of the — Court.

§ 107. [1432.] **Transfer not to Change Right to Administer.** — The transfer of a proceeding from one court to another, as provided for in the preceding section, shall not affect the right of any person to letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration on the estate in the order hereinbefore provided. If, before the administration is closed of any estate so transferred as herein provided, another person is elected or appointed and qualified as judge of the court wherein such proceeding was originally commenced

who is not disqualified to act in the settlement of the estate, and the causes for which the proceeding was transferred no longer exist, any person interested in the estate may have the proceeding returned to the court from which it was originally transferred, by filing a petition setting forth these facts, and moving the court therefor.

Arizona. — Same. Rev. Stats., sec. 1071.

Idaho. — Same. Rev. Stats., sec. 5406.

Montana. — Same. Comp. Stats., p. 299, sec. 111.

Utah. — Same. Comp. Laws, sec. 4091.

Form No. 69. — Petition for an Order Transferring Proceedings back to the Court where They were Originally Commenced.

[Caption, Form 1, § 5, *ante*.]

1. That the proceedings in the matter of the above-entitled estate were originally commenced in the — court of the county of —, state of —;

2. That on the — day of —, A. D. 18—, all the judges of that court being disqualified, that court made and entered the following order (here insert copy of order);

3. That on the — day of —, A. D. 18—, — was elected (or appointed) a judge of said — court of the county of —, and has duly qualified as a judge of said court, and he ever since has been and now is such judge;

4. That the disqualification mentioned in said order does not exist as to him, but he is qualified in every respect to act in said matter;

5. That the convenience of the parties interested in said estate will be promoted by the transfer of the proceedings of said estate back to said — court of the county of —, where they were originally commenced; —

Wherefore petitioner prays that the proceedings in the matter of said estate be transferred back to said — court of the county of —.

—, Petitioner.

—, Attorney for Petitioner.

§ 108. [1433.] Proceedings to be Returned. — On hearing the motion, if the facts required by the preceding section to be set out in the petition are satisfactorily shown, and it

further appears to the court that the convenience of parties interested would be promoted by such change, the judge must make an order transferring the proceeding back to the court where it was originally commenced; and the clerk of the court ordering the transfer must transmit to the clerk of the court in which the proceeding was originally commenced a certified copy of the order, and all the original papers on file in his office in the proceeding; and the court where the proceeding was originally commenced shall thereafter have jurisdiction and power to make all necessary orders and decrees to close up the administration of the estate.

Arizona.—Same. Rev. Stats., sec. 1072.

Idaho.—Same. Rev. Stats., sec. 5407.

Montana.—Same. Comp. Stats., p. 299, sec. 112.

Utah.—Same. Comp. Laws, sec. 4092.

**Form No. 70.—Order Transferring Proceedings
Back to the Court where They were Originally
Commenced.**

[Title of Court and Estate.]

It duly appearing to this court that since the order of the — court of the — county of —, state of, — was made and entered transferring the proceedings in the matter of said estate to this court, — was elected (or appointed) a judge of said — court of the — county of —, and is now a duly qualified and acting judge thereof, and that the disqualification mentioned in said order of transfer does not exist as to him, but that he is qualified in every respect to act in said matter; and it further appearing that the convenience of the parties interested in said estate will be promoted by the transfer of the proceedings of said estate back to said — court of the — county of — ;—

It is therefore ordered that the proceedings in the matter of said estate be transferred back to said — court of the — county of —, and the clerk of this court is hereby ordered and directed to transmit to the clerk of said court a certified copy of this order, and all the original papers on file in his office relating to said estate. —, Judge of the — Court.

Dated —.

ARTICLE X.

REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

- § 109. Suspension of powers of executors and administrators.
- § 110. To have notice of suspension, and to be cited to appear.
- § 111. Any party interested may appear on hearing.
- § 112. Notice to absconding executors and administrators.
- § 113. May compel attendance.

§ 109. [1436.] Suspension of Powers.—Whenever a judge of a superior court has reason to believe, from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle, the property of the estate committed to his charge, or has committed, or is about to commit, a fraud upon the estate, or is incompetent to act, or has permanently removed from the state, or has wrongfully neglected the estate, or has long neglected to perform any act as such executor or administrator, he must, by an order entered upon the minutes of the court, suspend the powers of such executor or administrator until the matter is investigated.

Arizona.—Same. Rev. Stats., sec. 1073.

Idado.—Same. Rev. Stats., sec. 5408.

Montana.—Same. Comp. Stats., p. 299, sec. 113.

Nevada.—Same. Gen. Stats., sec. 2950. See § 121, *post*.

“During the suspension of the powers of the executor or administrator, under the authority of the preceding section, the probate judge or court may, if the condition of the estate requires it, appoint a special administrator to take charge of the effects of the estate, who shall give the bond and account as other special administrators are required to do.” Gen. Stats., sec. 2951.

Oregon.—“Any heir, legatee, devisee, creditor, or other person interested in the estate may apply for the removal of an executor or administrator who has become of unsound mind, or been convicted of any felony, or a misdemeanor involving moral turpitude, or who has in any way been unfaithful to or neglected his trust, to the probable loss of the applicant. Such application shall be by petition, and upon notice to the executor or administrator; and if the court find the charge to be true, it shall make an order removing such executor or administrator, and revoke his letters.” Hill’s Laws, sec. 1094.

“If an executor or administrator become a non-resident of this state, he may be removed and his letters revoked in the manner prescribed in the last section, except that the notice may be given by publication for such time as the court or judge thereof may direct.” Hill’s Laws, sec. 1095.

“Whenever it appears probable to the court or judge that any of the causes for removal of an executor or administrator exist or have transpired, as specified in section 1094 [*supra*], it shall be the duty of such court or judge to cite

such executor or administrator to appear and show cause why he should not be removed; and if he fail to appear, or to show sufficient cause, an order shall be made removing him and revoking his letters; and it is the duty of the court or judge thereof to exercise a supervisory control over an executor or administrator, to the end that he faithfully and diligently perform the duties of his trust according to law." Hill's Laws, sec. 1100.

Utah. — Same as California. Comp. Laws, sec. 4093.

Washington. — Same as California. Code Proc., sec. 926.

Wyoming. — Same as California, except that in lieu of the words "of a superior court," the following is inserted: "commissioner or clerk of a court." Laws 1890-91, p. 262, sec. 9.

Negligence of Executor: See §§ 121, 122, 257, 258, 261, *post*.

Judge may suspend executor in Chambers: Cal. Code Civ. Proc., sec. 166.

Removal of Executor: See § 66, *ante*. *In re Walsh*, Myr. Prob. 251.

The discretion of a court in removing an administrator for any cause specified in the statute will not be interfered with by the appellate court unless it clearly appears that there has been a gross abuse of discretion: *Estate of Deck v. Gherke*, 6 Cal. 667.

It is the duty of the court to remove executor who fraudulently procures the conveyance of property, which should be conveyed to the estate, to others: *Mesmer v. Jenkins*, 61 Cal. 151; or one who refuses to include in his inventory a portion of the property of the estate, and refuses to have such property appraised: *Estate of Deck v. Gherke*, 6 Cal. 667.

The marriage of an executrix does not extinguish her authority *eo instante* so as to deprive her of all her powers, but having ceased to be competent, she may be proceeded against and removed: *Schroeder v. Superior Court*, 70 Cal. 343.

Waste, negligence, and mismanagement afford as good ground for removal as actual fraud: *Lucich v. Medin*, 3 Nev. 81.

Pending an appeal from an order removing an administrator of an estate, he is suspended from office, and it is within the power of the court to appoint a special administrator to act during the period of suspension, but not to appoint a general administrator until such order of removal becomes final: *In re Moore*, 86 Cal. 72.

County court has no authority to remove an executor or administrator except upon some one of the grounds laid down in the Civil Code, and if it is upon the ground that the executor or administrator "has been unfaithful to or neglected his trust," it must appear expressly or by necessary inference that the applicant for his removal has sustained a probable loss in consequence thereof: *In re Holladay*, 18 Or. 168.

An administrator or executor is liable to removal for failure to file an inventory of the estate within the time required by law: *In re Holladay*, 18 Or. 168.

Form No. 71. — Order Suspending Administrator (or Executor).

[Title of Court and Estate.]

Whereas, the undersigned, judge of the said court, has reason to believe, from his own knowledge (or from credible information), that —, the administrator of the above-named estate, has wasted, embezzled, and mismanaged the property of said estate. —

It is therefore ordered that his powers as such administrator be and they are hereby suspended until the matter is investigated; and it is further ordered that a citation be issued to him notifying him of such suspension, and requiring him to show cause in the above-entitled court on the — day of —, A. D. 18—, why his letters should not be revoked.

Dated —, 18—. —, Judge of the — Court.

Form No. 72. — Order Reinstating Administrator (or Executor) when his Powers have been Suspended.

[Title of Court and Estate.]

Whereas, this court heretofore made an order suspending the powers of —, the administrator of the above-named estate, until certain matters named in said order could be investigated; and whereas, said matters have been fully investigated, and it appearing that said administrator is not guilty of any charge heretofore made against him, nor of any misfeasance or malfeasance as such administrator; —

It is therefore ordered that his powers as such administrator be restored.

Dated —, 18—. —, Judge of the — Court.

§ 110. [1437.] Notice of Suspension.— When such suspension is made, notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or if appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked, and letters of administration granted anew, as the case may require.

Citation: See §§ 453-457, *post*.

Arizona. — Same. Rev. Stats., sec. 1074.

Idaho. — Same. Rev. Stats., sec. 5409.

Montana. — Same. Comp. Stats., p. 300, sec. 114.

Nevada. — Same. Gen. Stats., sec. 2952.

Oregon. — See Hill's Laws, secs. 1094, 1095, 1100, under last section.

Utah. — Same as California. Comp. Laws, sec. 4094.

Washington. — Same as California. Code Proc., sec. 927.

Wyoming. — Same as California, except that the words "or officer" are inserted after the words "the court." Laws 1890-91, p. 262, sec. 10.

Probate court has power on application of a non-resident heir to remove an administrator and appoint another: *In re Baldrige*, Sup. Ct. Ariz., Oct. 22, 1887.

Order removing an administrator, in the absence of a clear abuse of discretion, will not be disturbed on appeal: *In re Baldrige*, Sup. Ct. Ariz., Oct. 22, 1887.

An order appointing or removing an administrator cannot be collaterally attacked: *Ramp v. McDaniel*, 12 Or. 108.

Executors, power of removal: *In re Holladay*, 18 Or. 168.

An executor may be removed if he does not discharge the duty of his trust faithfully and as directed by law: *In re Bauquier*, 88 Cal. 302.

The court cannot remove an administrator without giving him an opportunity to be heard: *In re Moore*, 83 Cal. 584.

An administrator should not be removed except for good and sufficient cause: *In re Welch*, 86 Cal. 179.

Form No. 73. — Short Form of Order Revoking Letters of Administration.

[Title of Court and Estate.]

It appearing to the court that cause exists for the removal of —, administrator of the estate of —, deceased, and for the revocation of his letters of administration, —

It is ordered that the letters of administration heretofore issued herein to — be and the same are hereby revoked, and said — is directed to file an account and report of his administration within ten days.

Dated —, —, Judge of the — Court.

Form No. 74. — Order Revoking Letters of Administrator (or Executor) for Wasting Estate, etc.

[Title of Court and Estate.]

Whereas, charges have been preferred against —, the administrator of the above-named estate, and the court, on credible information, heretofore made an order herein suspending his powers until said charges could be investigated; and whereas, a citation was duly issued to him notifying him of such suspension, and directing him to show cause, at a time and place therein mentioned, which said citation has been duly served upon said administrator; and whereas, —, an heir at law of said deceased, has filed his written allegations showing reasons why the letters of said administrator should be revoked; and whereas, said administrator has answered said citation and said written allegations, and said matter came regularly on for hearing this day upon the allegations and proofs of the said parties, and it appearing therefrom that said administrator has grossly

mismanaged said estate, and has embezzled of the funds of said estate the sum of five thousand dollars, and appropriated the same to his own use;—

It is therefore ordered that the letters of the said administrator be and the same are hereby revoked.

Dated ———, Judge of the ——— Court.

§ 111. [1438.] Any Party Interested may Appear on Hearing.—At the hearing, any person interested in the estate may appear and file his allegations, in writing, showing that the executor or administrator should be removed; to which the executor or administrator may demur or answer, as hereinbefore provided. The issues raised must be heard and determined by the court.

Demurrer, Answer, etc.: See § 154, *post*.

Arizona.—Same. Rev. Stats., sec. 1075.

Idaho.—Same. Rev. Stats., sec. 5410.

Montana.—Same. Comp. Stats., p. 300, sec. 115.

Nevada.—“At the hearing, any person interested in the estate may appear and file his allegations, in writing, showing that the executor or administrator should be removed. Such allegations shall be heard and determined by the court.” Gen. Stats., sec. 2953.

Utah.—Same as California. Comp. Laws, sec. 4095.

Washington.—Same as California, to and including the word “answer”; balance omitted. Code Proc., sec. 928.

Wyoming.—Same as California, except that the words “or the officer making such charge” are inserted between “estate” and “may appear.” Laws 1890-91, p. 262, sec. 11.

When it is sought to remove an administrator for long delay in the settlement of an estate, the burden of proof rests upon the petitioner to show negligence or injury by reason of the delay; and the administrator has the right to rely upon the presumption in favor of fair conduct and faithful performance of official duty until evidence is offered tending to overcome it. The mere fact that the proceeding has been pending for sixteen years without a final account does not throw upon the administrator the duty of disproving the charge of negligence. But if he offers to explain the delay by evidence that the administration had been prolonged by reason of litigation, it is error to reject

such evidence; and for the purpose of showing unavoidable delay and good faith, he has the right to introduce every paper in the case tending to show the history of the various proceedings had therein: *In re Moore*, 83 Cal. 583.

Papers on file cannot be considered as evidence, unless offered in evidence upon the hearing of a petition to remove the administrator; and the mere commenting on them in argument is not sufficient to entitle the party to have them considered in evidence: *In re Moore*, 83 Cal. 584.

Where county court determines on the removal of an executor or administrator of an estate, and the petition contains several grounds upon

which the removal is sought to be procured, the court should indicate the particular ones it sustains: *In re Holaday*, 18 Or. 168.

A jury cannot try questions of removal of administrators: *In re Doyle*, Myr. Prob. 68.

Form No. 75.—Allegations Showing Cause for the Removal of an Administrator (or Executor).

[Title of Court and Estate.]

Now comes —, one of the heirs at law of —, deceased, and makes the following allegations, in writing, as reasons why —, administrator of the estate of said deceased, should be removed:—

1. That said administrator has wasted and is wasting said estate, in this, that he is engaging in numerous lawsuits with the creditors of said estate; that he is disallowing the claims of said creditors, although such claims are justly due to said creditors from said estate, for the purpose and with the intent of causing such creditors to sue him as such administrator; that he is conniving with his attorneys in procuring for them an allowance of a large attorney fee in each case, and that he and they divide the proceeds of said fees;

2. That he has embezzled and converted to his own use large sums of money belonging to said estate, to wit, about the sum of five thousand dollars:—

Therefore the undersigned prays that the letters of said administrator be revoked. —, Attorney for said —.

§ 112. [1439.] Notice to Absconding Executors.—

If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the state, notice may be given him of the pendency of the proceedings by publication; in such manner as the court may direct, and the court may proceed upon such notice as if the citation had been personally served.

Arizona.—Same. Rev. Stats., sec. 1076.

Idaho.—Same. Rev. Stats., sec. 5411.

Montana.—Same. Comp. Stats., p. 300, sec. 116.

Nevada.—Same. Gen. Stats., sec. 2954.

Utah.—Same. Comp. Laws, sec. 4096.

Washington.—Same. Code Proc., secs. 929.

Wyoming.—Same. Laws 1890-91, p. 262, sec. 12.

§ 113. [1440.] May Compel Attendance. In the proceedings authorized by the preceding sections of this article for the removal of an executor or administrator, the court may compel his attendance by attachment, and may compel him to answer questions, on oath, touching his administration, and upon his refusal so to do may commit him until he obey, or may revoke his letters, or both.

Contempt: See Cal. Code Civ. Proc., secs. 1209-1219.

Arizona. — Same. Rev. Stats., sec. 1077.

Idaho. — Same. Rev. Stats., sec. 5412.

Montana. — Same. Comp. Stats., p. 300, sec. 117.

Nevada. — Same. Gen. Stats., sec. 2955. See § 121, *post*.

Utah. — Same. Comp. Laws, sec. 4097.

Washington. — Same. Code Proc., sec. 930.

Wyoming. — Same. Laws 1890-91, p. 262, sec. 13.

CHAPTER IV.

OF THE INVENTORY AND COLLECTION OF THE EFFECTS OF
DECEDENTS.

. ARTICLE I. INVENTORY, APPRAISEMENT, AND POSSESSION OF ESTATE.

. II. EMBEZZLEMENT AND SURRENDER OF PROPERTY OF ESTATE.

ARTICLE I.

INVENTORY, APPRAISEMENT, AND POSSESSION OF ESTATE.

- § 114. Inventory to be returned, including the homestead.
- § 115. Appraisement, and pay of appraisers.
- § 116. Oath of appraisers, and inventory how made.
- § 117. Inventory to account for moneys—If all money, no appraisement necessary.
- § 118. Effect of naming a debtor executor.
- § 119. Discharge or bequest of debt against executor.
- § 120. To make oath to inventory.
- § 121. Letters may be revoked for neglect of administrator.
- § 122. Inventory of after-discovered property.
- § 123. Administrator and executor to possess real and personal estate.
- § 124. Executor or administrator to deliver real estate to heirs or devisees at the end of ten months, unless there are debts to be satisfied.

§ 114. [1443.] Inventory to Include Homestead.—Every executor or administrator must make and return to the court, within three months after his appointment, a true inventory and appraisement of all the estate of the decedent, including the homestead, if any, which has come to his possession or knowledge.

Arizona.—Same. Rev. Stats., sec. 1078.

Idaho.—Same. Rev. Stats., sec. 5420.

Montana.—Same. Comp. Stats., p. 301, sec. 118.

Nevada.—Same. Gen. Stats., sec. 2774.

Oregon.—Same, except that inventory must be filed in one month, or such further time as the court or judge may allow. The phrase "including the homestead" is omitted. Hill's Laws, sec. 1112.

Utah.—Same as California. Comp. Laws, sec. 4098.

Washington.—Same as California, except that inventory must be filed in one month. Code Proc., sec. 957.

Wyoming.—Same as California, except that in lieu of "three" insert "two." Laws 1890-91, p. 263, sec. 1.

Damages recovered by an administrator for the death of the decedent, caused by negligence, are for the benefit of the heir or heirs, and do not constitute any part of the estate of the deceased: *Munro v. Dredging Co.*, 84 Cal. 516.

Executor or administrator may be removed for failing to file inventory: *In re Holladay*, 18 Or. 168. See also § 121 *post*.

An executor who includes property in an inventory of the estate of his testator is not thereby estopped from claiming the property as his own: *Anthony v. Chapman*, 65 Cal. 73. *Contra*, see *In re Loeven*, Myr. Prob. 203.

The right of a deceased to the possession of public lands descends

among his effects to his executor: *Grover v. Hawley*, 5 Cal. 486; *Carrhart v. M. M. L. & M. Co.*, 1 Mont. 245.

A judge may receive inventory at chambers: Cal. Code Civ. Proc., sec. 166. See also § 1, *ante*.

The filing of an inventory is not a prerequisite to the taking possession of the estate by an administrator: *Black v. Story*, 7 Mont. 238. *Carrhart v. M. M. L. & M. Co.*, 1 Mont. 245, distinguished and overruled.

An inventory filed by an administrator is not conclusive evidence either for or against him or sureties, but is open to denial or explanation: *McNabb v. Wixom*, 7 Nev. 163.

§ 115. [1444.] **Appraisement.** — To make the appraisement, the court, or a judge thereof, must appoint three disinterested persons (any two of whom may act), who are entitled to receive a reasonable compensation for their services, not to exceed five dollars per day, to be allowed by the court or judge. The appraisers must, with the inventory, file a verified account of their services and disbursements. If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed, either by the court or judge having jurisdiction of the estate, or by the court or judge of such other county, on request of the court or judge having jurisdiction.

Arizona. — Same, except that the fees are three dollars. Rev. Stats., sec. 1079.

Idaho. — Same as California, except that the fees are four dollars. Rev. Stats., sec. 5421.

Montana. — Same as California, except that "if only one day's services are charged, the account need not be sworn to." Comp. Stats., p. 301, sec. 119. See § 1, *ante*.

Nevada. — Same as California, except that if only one day's services are charged, the account need not be verified, and the following is omitted: "On request of the court or judge having jurisdiction." Gen. Stats., sec. 2775.

Oregon. — "Before the inventory is filed, the property therein specified shall be appraised at its true cash value by three disinterested and competent persons, who shall be appointed by the court, or judge thereof; but if any part of the property shall be in a county other than that where the administration is granted, the appraisers thereof may be appointed by such court or judge, or the court or judge thereof of the county where the property shall be; in

the latter case a certified copy of the order of appointment shall be filed with the inventory." Hill's Laws, sec. 1114.

Utah. — Same as California. Comp. Laws, sec. 4099.

Washington. — "The estate and effects comprised in the inventory shall be appraised by three suitable disinterested persons, who shall be appointed by the court. If any part of the estate shall be in another county than that in which letters are issued, appraisers residing in such county may be appointed by the court having jurisdiction of the case, or if most advisable, the same appraisers may act. Such appraisers shall receive as compensation for their services three dollars per day, to be paid out of the estate, and when they have to go out of their county, mileage shall be allowed; *provided*, that where it appears to the satisfaction of the court, from the return of the inventory or other proof, that the whole estate consists of personal property of less value than one hundred dollars, exclusive of moneys, drafts, checks, bonds, or other securities of fixed valuation, an appraisement may be dispensed with, in the discretion of the court." Code Proc., sec. 958. See § 1, *ante*.

Wyoming. — Same as California, except that compensation is three dollars and mileage, and that clerk or commissioner may act, as well as judge, etc. Laws 1890-91, p. 263, sec. 2.

Appraisers may be Appointed in Chambers: Cal. Code Civ. Proc., sec. 166. See § 1, *ante*. **Homestead, Setting Apart to Use of Family:** See §§ 130-133, *post*; also Cal. Civ. Code, sec. 1265.

Form No. 76. — Order Appointing Appraisers.

[Title of Court and Estate.]

It is ordered that —, —, and — be and they are hereby appointed appraisers of the estate of —, deceased.

Dated —, 18—. —, Judge of the — Court.

Recitals in Order: See § 314, *post*.

§ 116. [1445.] Oath and Duty of Appraisers. — Before proceeding to the execution of their duty, the appraisers, before any officer authorized to administer oaths, must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly, and impartially appraise the property exhibited to them according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in dollars and cents, in figures, opposite to the articles respectively; the inventory must contain all of the estate of decedent, real and personal, a statement of all debts, partnerships, and other interests, bonds, mortgages, notes, and other securities for the payment of money belonging to the de-

cedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon (if any), with their dates, and the sum which, in the judgment of the appraisers, may be collected on each debt, interest, or security; the inventory must show, so far as the same can be ascertained by the executor or the administrator, what portion of the property is community property, and what portion is the separate property of the decedent.

Arizona. — Same. Rev. Stats., sec. 1080.

Idaho. — Same. Rev. Stats., sec. 5422.

Montana. — Same. Comp. Stats., p. 301, sec. 120.

Nevada. — Same. Gen. Stats., sec. 2776.

Oregon. — "Before making the appraisal, the appraisers shall each take and subscribe an affidavit, to be filed with the inventory, to the effect that he will honestly and impartially appraise the property which shall be exhibited to him, according to the best of his knowledge and ability." Hill's Laws, sec. 1115.

"The appraisers shall appraise each article of property separately, and set down the value thereof in dollars and cents opposite the entry of the article in the inventory. Money, of whatever nature, that is a legal tender, is to be appraised at its nominal value; but debts, of all descriptions or kinds, are to be appraised at that sum which, in the judgment of the appraisers, may be realized from them by due process of law. When the appraisal is completed, the inventory shall be signed by the appraisers." Hill's Laws, sec. 1116.

"The inventory shall contain . . . also a statement of all debts due the deceased, the written evidence thereof, and the security therefor, if any exist, specifying the name of each debtor, the date of each written evidence of debt, and security therefor, the sum originally payable, the indorsements thereon, if any, and their dates, and the sum appearing then to be due thereon." Hill's Laws, sec. 1113.

"The executor or administrator of a deceased person who was a member of a copartnership shall include in the inventory of such person's estate, in a separate schedule, the whole of the property of such partnership; and the appraisers shall estimate the value thereof, and also the value of such person's individual interest in the partnership property, after the payment or satisfaction of all the debts and liabilities of the partnership." Hill's Laws, sec. 1101.

Utah. — Same as California. Comp. Laws, sec. 4100.

Washington. — Same as California; four last lines omitted. Code Proc., sec. 959.

Same as section 1101, Hill's Laws, *supra*. Code Proc., sec. 947.

Wyoming. — Same as California, except that the word "moneys" is inserted after "statement of all," in the eleventh line. Laws 1890-91, p. 263, sec. 3.

Valuation in inventory is not conclusive: *In re Hinky*, 58 Cal. 516. The margin in value of property pledged by a decedent over the debt secured is to be deemed the value of the estate's property therein: *In re Kidd*, Myr. Prob. 239.

The fact that the surviving wife became administratrix of the estate of her deceased husband, and by mistake

of law, in ignorance of her rights, inventoried outside lands as his property by operation of law, does not estop her from claiming the property as her own: *Baker v. Brickell*, 87 Cal. 329.

The valuation of property in the inventory is only *prima facie* evidence of the value of such property: *Wheeler v. Bolton*, 92 Cal. 159.

Form No. 77.—Inventory and Appraisement.

[Title of Court and Estate.]

I, —, county clerk of the — county of —, state of —, and *ex officio* clerk of the — court thereof (or other official title of the clerk of the court of probate, as the case may require), do hereby certify that —, —, and — have been duly appointed appraisers of the estate of —, deceased, by order of the court, duly entered and recorded on the — day of —, 18—.

Witness my hand and seal of said — court this — day of —, 18—. —, Clerk.

By —, Deputy Clerk.

State of —, }
— County of —. } ss.

— and —, duly appointed appraisers of the estate of —, deceased, being duly sworn, each for himself says that he will truly, honestly, and impartially appraise the property of said estate which shall be exhibited to him according to the best of his knowledge and ability. —
—

Subscribed and sworn to before me this — day of —, 18—. — (name of office).

INVENTORY AND APPRAISEMENT OF THE PROPERTY OF THE ESTATE OF —, DECEASED.

Real Estate.

Lot 1 in block No. 40, of the town of Galt, in the county of Sacramento, California, together with the improvements thereon, valued at.....\$—

Lot 1 in the block between J and K and Twentieth and Twenty-first streets of the city of Sacramento, in the county of Sacramento, California, valued at.....\$—

Personal Property.

Money which has come to the hands of the administrator, \$——

Household furniture (set out each article and its value separately).....\$——

Farming utensils (set out each article and its value separately).....\$——

All of said property is community (separate) property.

Total value of property.....\$——

We, the undersigned appraisers of the above-named estate, hereby certify that we have appraised the property of said estate exhibited to us as above set forth, and at the total value of \$——.

—— }
—— } Appraisers.
—— }

State of ——, }
—— County ——. } ss.

——, the —— of the estate of ——, deceased, being duly sworn, says that the annexed inventory contains a true statement of all the estate of the deceased that has come to the knowledge and possession of deponent, and particularly of all money belonging to said deceased, and of all just claims of said deceased against deponent.

Subscribed and sworn to before me this —— day of ——, A. D. 18—. —— (name of office).

Estate of ——, Deceased,

To ——, Appraiser, Debtor.

To three days' services in appraising the property of said estate.....\$15

To railroad fare from Sacramento to Galt and return..... 1

Total value of estate.....\$16

NOTE. — Account of appraisers must be verified as other claims against estate.

§ 117. [1446.] Inventory to Account for Moneys. —

The inventory must also contain an account of all moneys belonging to the decedent which have come to the hands of the executor or administrator, and if none, the fact must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisement, but an inventory must be made and returned as in other cases.

Arizona. — Same. Rev. Stats., sec. 1081.

Idaho. — Same. Rev. Stats., sec. 5423.

Montana. — Same. Comp. Stats., p. 302, sec. 121.

Nevada. — Same, except that the last sentence is omitted. Gen. Stats., sec. 2777.

Oregon. — "The inventory shall contain an account of all money belonging to the deceased, or a statement that none has come to the possession or knowledge of the executor or administrator." Hill's Laws, sec. 1113.

Utah. — Same as California. Comp. Laws, sec. 4101.

Washington. — Same as California; last sentence omitted. Code Proc., sec. 960.

Wyoming. — See last section.

Money placed in bank by wife by her death, and must be inventoried to order of herself and husband is not in her estate: *In re Cunningham*, Myr. a gift to latter, but is a simple authority to him to draw, and is revoked Prob. 76.

§ 118. [1447.] Effect of Naming a Debtor Executor. — The naming of the person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due.

Arizona. — Same. Rev. Stats., sec. 1082.

Idaho. — Same. Rev. Stats., sec. 5424.

Montana. — Same. Comp. Stats., p. 302, sec. 122.

Nevada. — Same. Gen. Stats., sec. 2778.

Oregon. — Same. Hill's Laws, sec. 1117.

Utah. — Same. Comp. Laws, sec. 4102.

Washington. — Same, except that administrator is also included. Code Proc., sec. 961.

Wyoming. — Same as California. Laws 1890-91, p. 264, sec. 4.

A debt due from an administrator debts: *United States v. Eggleston*, 4 to decedent is assets in his hands applicable to the payment of Saw. 199.

§ 119. [1448.] Discharge or Bequest of Debt against Executor. — The discharge or bequest in a will of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the debt or demand. It must be included in the inventory, and if necessary, applied in the payment of the debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies.

Arizona. — Same. Rev. Stats., sec. 1083.

Idaho. — Same. Rev. Stats., sec. 5425.

Montana. — Same. Comp. Stats., p. 302, sec. 123.

Nevada. — Same. Gen. Stats., 2779.

Oregon. — Same. Hill's Laws, sec. 1118.

Utah. — Same. Comp. Laws, sec. 4103.

Washington. — Same. Code Proc., sec. 962.

Wyoming. — Same. Laws 1890-91, p. 264, sec. 5.

§ 120. [1449.] Oath to Inventory. — The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon or annexed to the inventory.

Arizona. — Same. Rev. Stats., sec. 1084.

Idaho. — Same. Rev. Stats., sec. 5426.

Montana. — Same. Comp. Stats., p. 302, sec. 124.

Nevada. — Same. Gen. Stats., sec. 2780.

Oregon. — See Hill's Laws, under § 116, *ante*.

"An executor or administrator shall . . . make and file with the clerk an inventory, verified by his own oath, of all the real and personal property of the deceased which shall come to his possession or knowledge. Hill's Code, sec. 1112.

Utah. — Same as California. Comp. Laws, sec. 4104.

Washington. — Same as California. Code Proc., sec. 963.

Wyoming. — Same as California. Laws 1890-91, p. 264, sec. 6.

§ 121. [1450.] Letters Revoked for Neglect. — If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the court or judge shall, for reasonable cause, allow, the court may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, or any person interested therein, arising from such failure.

Arizona. — Same. Rev. Stats., sec. 1085.

Idaho. — Same. Rev. Stats., sec. 5427.

Montana. — Same. Comp. Stats., p. 302, sec. 125.

Nevada. — Same, except that the revocation may be "with or without further notice," and also the words "or any person interested therein," are omitted. Gen. Stats., sec. 2781.

"The district courts shall have power to open and receive the proofs of last wills and testaments, and to admit them to probate; to grant letters testamentary, of administration and guardianship, and to revoke the same for cause shown, according to law; to compel executors, administrators, and guardians to render an account when required, or at the period fixed by law; to order the sale of property of estates or belonging to minors; to order the payment of debts due by estates; to order and regulate all partitions of property or estates of deceased persons; to compel the attendance of witnesses; to appoint appraisers or arbitrators [administrators]; to compel the production of title papers or other property of an estate or of a minor, and to make such other orders as may be necessary and proper in the exercise of the jurisdiction conferred upon them by law." Gen. Stats., sec. 2448.

"The district courts . . . shall have original jurisdiction . . . in all cases relating to the estates of deceased persons, and the persons and estates of minors and insane persons." Const., art. VI., sec. 6; Gen. Stats., sec. 137.

Utah. — Same as California. Comp. Laws, sec. 4105.

Washington. — "If any executor or administrator shall neglect or refuse to return the inventory within the period prescribed, or within such further time, not exceeding three months, as the court shall allow, the court shall revoke the letters testamentary or of administration; and the executor or administrator shall be liable on his bond to any party interested for the injury sustained by the estate through his neglect." Code Proc., sec. 964.

Wyoming. — Same as California, except that "or commissioner" is inserted after "judge," in fourth line, and "judge or commissioner" is inserted after "the court," in the fifth line. Laws 1890-91, p. 264, secs. 7-9.

Administrator is liable to be removed for failure to file inventory: *In re Holladay*, 18 Or. 168; *In re Walsh*, Myr. Prob. 251. Section cited in *Mesmer v. Jenkins*, 61 Cal. 154. **Suspension of Executors and Administrators:** See §§ 84, 109, *ante*.

§ 122. [1451.] Inventory of After-discovered Property. — Whenever property not mentioned in an inventory that is made and filed comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this article, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office.

Arizona. — Same. Rev. Stats., sec. 1086.

Idaho. — Same, except that the phrase, "of more than two hundred and fifty dollars in value," is inserted after the word "property." Rev. Stats., sec. 5428.

Montana. — Same as California. Comp. Stats., p. 303, sec. 126.

Nevada. — Same as California. Gen. Stats., sec. 2782.

Oregon. — Same as California, except that the inventory must be made immediately, and the provision for enforcing the making of the inventory is omitted. Hill's Laws, sec. 1119.

Utah. — Same as California. Comp. Laws, sec. 4106.

Washington. — Same as California, except that it requires the inventory to be returned as soon as practicable after the discovery of property. Code Proc., sec. 965.

Wyoming. — Same as California. Laws 1890-91, p. 264, sec. 8.

Section cited in *Mesmer v. Jenkins*, 61 Cal. 154.

§ 123. [1452.] Possession of Estate. — The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate, until the estate is settled, or until delivered over by order of the court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings, and fixtures thereon which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator. But this section shall not be so construed as requiring them so to do.

Arizona. — Same; last sentence omitted. Rev. Stats., sec. 1087.

Idaho. — Same. Rev. Stats., sec. 5429.

Montana. — Same as Arizona. Comp. Stats., p. 303, sec. 127.

Nevada. — Same; two last sentences omitted. Gen. Stats., sec. 2783.

Oregon. — "The executor or administrator is entitled to the possession and control of the property of the deceased, both real and personal, and to receive the rents and profits thereof until the administration is completed, or the same is surrendered to the heirs or devisees by order of the court, or judge thereof; but where such property, or any portion thereof, is in the possession of a third person by virtue of a valid subsisting lease or bailment, the possession and control of the executor or administrator is subordinate to the right of the lessee or bailee. During the time the property is in the possession or control of the executor or administrator, it is his duty to keep the same in repair, and preserve it from loss or decay as far as possible." Hill's Laws, sec. 1120.

Utah. — Same as California. Comp. Laws, sec. 4107.

Washington. — Same as Arizona. Code Proc., sec. 956.

Wyoming. — Same as California. Laws 1890-91, p. 264, sec. 9.

Executor's Powers: See §§ 46, 103, *ante*, 224, 458, *post*.

Right to Bring Actions: See §§ 125, 224, *et seq.*, *post*.

When Heirs have Right to Possession: See § 124, *post*.

Possession, Rights of Executor and Heirs: See § 464, *post*; see also § 224, *post*, and notes.

Partnership: See § 228, *post*.

Executor of a tenant in common has no right to exclude a sur-

living co-tenant from the common lands. Either may maintain ejectment against an intruder, or they may sue jointly: *McLeran v. Benton*, 31 Cal. 33.

Executor or administrator may maintain ejectment: *Curtis v. Herrick*, 14 Cal. 119.

Grantee of heir not entitled to possession of realty until close of administration: *Chapman v. Hollister*, 42 Cal. 462.

The statutory prohibition against the heir maintaining an action to recover the real property of his intestate was removed when the codes took effect: *Crosby v. Dowd*, 61 Cal. 557, 600.

The exclusive right to the possession of realty of an estate and control of the action to recover it is vested in the administrator pending administration: *Meeks v. Vassault*, 3 Saw. 206.

Limitation runs against the heirs, notwithstanding the fact that the present right of action to recover realty of an estate is in the administrator, who for that purpose is a trustee for the heirs. This rule applies to minor heirs. In a proper case the heirs can compel the administrator to sue: *Meeks v. Vassault*, 3 Saw. 206.

An administrator cannot pay out the money of the estate to remove an encumbrance from the property of the estate, which debt the estate is in no way responsible for: *In re Knight*, 12 Cal. 200.

He is to take care of, manage, and preserve the estate committed to him; but this does not mean that he is, at discretion, to pay off all encumbrances resting on the property, upon the notion that property may increase in value, and thereby a speculation may be made for the estate: *In re Knight*, 12 Cal. 200.

If a case should arise in which a great sacrifice would ensue unless money were paid to discharge an encumbrance, it is not impossible that a

court of chancery might order the expenditure of the money needed to remove such encumbrance: *In re Knight*, 12 Cal. 200.

If an administrator undertakes to go beyond the strict line of his duty as the law defines it, he acts upon his own responsibility, and while he can receive no profit from a successful issue of his investment, he must bear the loss of a failure: *In re Knight*, 12 Cal. 200.

The administrator, in the absence of special authority, must administer the estate as he finds it, paying taxes and other necessary expenses, and doing such other acts as are necessary to preserve it as left. He cannot advance money to remove encumbrances, unless his intestate was bound to pay the money: *In re Knight*, 12 Cal. 200.

Administrator may maintain possessory action to recover the realty of his intestate: *Oury v. Duffield*, 1 Ariz. 509.

Actions for the possession of realty, or damages thereto, cannot be maintained by an administrator: *Carrhart v. Mont. M. Co.*, 1 Mont. 245.

The heir is entitled to recover from a stranger real property which he has inherited, notwithstanding there is an acting executor or administrator of the ancestor's estate: *Gossage v. Crown Point G. & S. M. Co.*, 14 Nev. 153.

Guardian will not be allowed for permanent improvements placed by him on his ward's real property without authority: *Gerber v. Bauerline*, 17 Or. 115.

An administrator can maintain ejectment for the property of his intestate, notwithstanding he has obtained the legal title to the premises and deeded the same to the heirs: *McClelland v. Dickenson*, 2 Utah, 100.

An administrator takes charge of the entire estate, whether it passes to the heir or is otherwise disposed of: *Ward v. Moorey*, 1 Wash. Ter. 104.

§ 124. [1453.] **Disposition of Realty.**— Unless it satisfactorily appears to the court that the rents, issues, and profits of the real estate for a longer period are necessary to be received by the executor or administrator wherewith to pay the debts of the decedent, or that it will probably be neces-

sary to sell the real estate for the payment of such debts, the court, at the end of the time limited for the presentation of claims against the estate, must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or devisees.

Arizona. — Same. Rev. Stats., sec. 1088.

Idaho. — Same. Rev. Stats., sec. 5430.

Montana. — Same. Gen. Stats., p. 303, sec. 128.

Oregon. — "The real property of the deceased is the property of those to whom it descends by law, or is devised by will, subject to the possession of the executor or administrator, and to be applied to the satisfaction of claims against the estate, as by this chapter provided; but upon the settlement of the estate, and the termination of the administration thereof, so much of such real property as remains unsold or unappropriated is discharged from such possession and liability without any order or decree therefor. But if there be any surplus of the proceeds of the sale of such real property, or any part thereof, the court, or judge thereof, shall order and direct a distribution of such surplus among those who would have been entitled to such land if the same had not been sold." Hill's Laws, sec. 1192.

Utah. — Same as California. Comp. Laws, sec. 4108.

ARTICLE II.

EMBEZZLEMENT AND SURRENDER OF PROPERTY OF THE ESTATE.

§ 125. Embezzling estate before grant of letters testamentary.

§ 126. Citation to person suspected to have embezzled estate, etc.

§ 127. Refusal to obey citation, penalty for, and for embezzlement — May be compelled to disclose by imprisonment — Liable for double damages.

§ 128. Persons intrusted with estate of decedent may be cited to account.

§ 125. [1458.] **Embezzling Estate.** — If any person before the granting of letters testamentary or of administration embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

Arizona. — Same. Rev. Stats., sec. 1089.

Idaho. — Same. Rev. Stats., sec. 5431.

Montana. — Same. Comp. Stats., p. 303, sec. 129.

Nevada. — Same. Gen. Stats., sec. 2785.

Oregon. — Same. Hill's Laws, sec. 1125.

Utah. — Same, except that "moneys" is omitted. Comp. Laws, sec. 4109.

Washington. — Same as California. Code Proc., sec. 967.

Wyoming. — Same as California. Laws 1890-91, p. 265, sec. 1.

Executor's Powers to Sue: See §§ 123, *ante*, § 24 et seq., *post*; *Jahns v. Nolting*, 29 Cal. 511.

The powers of the court under this article are analogous to the powers of courts of chancery upon bills of discovery: *Mcsmier v. Jenkins*, 61 Cal. 154.

The direction in a will to convert land into money, or money into land, is for the benefit of those for whose use the conversion is intended to be

made, and as to them it is deemed to have been made from the death of the testator. It does not operate as a devise of the land to the executor. The title thereto vests, on the death of the ancestor, in his heir, and such heir may maintain an action to recover the possession of such land from any person other than the executor. To cut off the heir at law, the estate must be devised expressly to some other person: *Estep v. Armstrong*, 91 Cal. 659.

§ 126. [1459.] Citation to Person Suspected to have Embezzled Estate, etc. — If any executor, administrator, or other person interested in the estate of a decedent complains to the superior court, or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings which contain evidences of, or tend to disclose, the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined, either before the superior court of the county where he is found, or before the superior court of the county where the decedent dies or where letters have been granted. But if in the latter case he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

Arizona. — Same. Rev. Stats., sec. 1090.

Idaho. — Same. Rev. Stats., sec. 5432.

Montana. — Same. Comp. Stats., p. 303, sec. 130.

Nevada. — Same. Gen. Stats., sec. 2786.

Oregon. — "Whenever it appears probable from the affidavit of an executor or administrator, or that of an heir or other person interested in the estate, that any person has concealed or in any way secreted or disposed of any property of the estate, or any writing relating or pertaining thereto, or that such person has knowledge of any such property or writing being so concealed, secreted, or disposed of, and refuses to disclose the same to the executor or

administrator, the court, or judge thereof, upon the application of such executor or administrator, may cite such person to appear and answer under oath concerning the matter charged." Hill's Laws, sec. 1121.

"If such person be not in the county where administration is granted, the proceeding may be either before the court, or judge thereof, of such county, or before the court, or judge thereof, of the county where such person resides or may be found." Hill's Laws, sec. 1122.

Utah. — Same as California. Comp. Laws, sec. 4110.

Washington. — "If the executor, administrator, heir, legatee, creditor, or other person interested in the estate of any deceased person shall complain to the court, on oath, that any person is suspected of having concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the deceased, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings which contain evidence of or tend to disclose the right, title, interest, or claim of the deceased to any real or personal estate, or any claim, demand, or last [lost] will of the deceased, the said court may cite such person to appear, and may examine him on oath upon the matter of such complaint. If such person be not in the county where letters have been granted, he may be cited and examined, either before the court for the county where he may be found, or before the court issuing the order or citation; but in the latter case, if he appear and be found innocent, his necessary expenses shall be allowed him out of the estate." Code Proc., sec. 968.

Wyoming. — Same as California, except that the complaint must be in writing, and a commissioner may act. Laws 1890-91, p. 265, sec. 2.

Citation: See §§ 317-321, *post*.

The probate court has no authority to make an order for the payment into a bank, subject to its further orders, of money of the decedent claimed by the party holding it as a gift from decedent, nor to commit such party for contempt in dis-

obeying such order: *Ex parte Casey*, 71 Cal. 269. See also Cal. Code Civ. Proc., sec. 572.

This section does not apply to transactions occurring after the death of testator: *In re Imhaus*, Myr. Prob. 99.

Form No. 78. — Petition Charging Embezzlement, etc., of the Property, etc., of an Estate.

[Caption, Form No. 1, § 5, *ante*.]

1. That petitioner is the duly qualified and acting administrator (or executor) of said estate;

2. That petitioner is informed and believes, and therefore alleges, that — has in his possession certain property of the estate of —, deceased, to wit, one diamond ring of the value of five hundred dollars, fifty shares of the capital stock of the California Mining Company, of the value of five thousand dollars;

3. That he refuses to deliver said property, or any part thereof, to the administrator (or executor) of said estate, but conceals and has embezzled the same;—

Wherefore petitioner prays that a citation be issued herein, directed to said —, requiring him to show cause, if any he can, why he should not deliver said property to said administrator (or executor), and further requiring that he appear at a time and place to be specified therein, to be examined on oath in relation to said property. —, Petitioner.

—, Attorney for Petitioner.

Verification as in Form No. 55, § 81, *ante*.

§ 127. [1460.] Refusal to Obey Citation.—If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidences of, or tending to disclose, the right, title, interest, or claim of the decedent to any real or personal estate, claim, or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order for such disclosure, made upon such examination, shall be *prima facie* evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property, and damages in addition thereto equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side.

Contempt: Cal. Code Civ. Proc., secs. 1209-1219.

Arizona.—Same. Rev. Stats., sec. 1091.

Idaho.—Same. Rev. Stats., sec. 5433.

Montana. — Same, except that the two last sentences are omitted. Comp. Stats., p. 304, sec. 131.

Nevada. — Same as California. Gen. Stats., sec. 2787.

Oregon. — "Such examination may be oral, or upon written interrogatories filed by the applicant, but in either case the answers of the person cited shall be reduced to writing, and subscribed by him and filed. If such person be not in the county where administration is granted, the proceeding may be either before the court, or judge thereof, of such county, or before the court, or judge thereof, of the county where such person resides or may be found. In the latter case a certified copy of the written interrogatories, if any, and the examination or other proceeding thereon or connected therewith, shall be filed with the clerk of the court where administration is granted." Hill's Laws, sec. 1122.

"If the person so cited refuse to appear, or to answer such interrogatories as may be allowed to be put to him touching the matter charged, he may be punished for a contempt, or may at once be committed, by the warrant of the judge, to the county jail, there to remain in close custody until he submits to the order of the court or judge." Hill's Laws, sec. 1123.

Utah. — Same as California. Comp. Laws, sec. 4111.

Washington. — "If the person so cited refuse to appear and submit to such examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he shall submit to the order of the court, and all such interrogatories and answers shall be in writing, and shall be signed by the party examined, and filed in the court." Code Proc., sec. 969.

Wyoming. — Same as California, except that the words "judge or commissioner" are inserted after the word "court," in the fourth line. Laws 1890-91, p. 265, sec. 3.

Form No. 79.—Commitment for Contempt.

[Title of Court and Estate.]

Whereas, after due and legal proceedings had herein, this court, on the — day of —, A. D. 18—, duly made and entered its order directing and requiring — to (here state the requirements of the order), and whereas said — has due and legal notice of said order, but has refused, and now refuses, to obey the same, and whereas it is in the power of said — to obey the mandate of said order;—

It is therefore adjudged that the said — be committed to the custody of the sheriff of the county of —, state of —, and that he be confined by said sheriff in the county jail of said county of — until he, said —, obeys the said order of this court.

—, Judge of the — Court.

Dated —, 18—.

§ 128. [1461.] Persons Intrusted with Estate to Account. — The superior court, or a judge thereof, upon the complaint, on oath, of any executor or administrator, may cite any person who has been intrusted with any part of the estate of the decedent to appear before such court, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other property or papers belonging to the estate which have come to his possession in trust for the executor or administrator, and of his proceedings thereon; and if the person so cited refuses to appear and render such account, the court may proceed against him as provided in the preceding section.

Citation: See §§ 317-321, *post*.

Arizona. — Same. Rev. Stats., sec. 1092.

Idaho. — Same. Rev. Stats., sec. 5434.

Montana. — Same. Comp. Stats., p. 305, sec. 132.

Nevada. — Same. Gen. Stats., sec. 2788.

Oregon. — “The court, or judge thereof, upon the application of the executor or administrator, may cite any person who has been intrusted with any of the property of the deceased to appear and answer concerning the same when it appears probable that such person refuses or neglects to render to the executor or administrator a true account thereof. The application shall be made and the proceeding conducted in the manner prescribed in sections 1121 [under § 126, *ante*], 1122, and 1123 [under last section], concerning property or writings alleged to be concealed, and with like effect.” Hill’s Laws, sec. 1124.

Utah. — Same as California. Comp. Laws, sec. 4112.

Washington. — Same as California, except that the words “or a judge thereof” are omitted. Code Proc., sec. 970.

Wyoming. — Same as California, except that judge or commissioner may also act. Laws 1890-91, p. 266, sec. 4.

CHAPTER V.

OF THE PROVISION FOR THE SUPPORT OF THE FAMILY, AND
OF THE HOMESTEAD.

ARTICLE I. OF THE PROVISION FOR THE SUPPORT OF THE FAMILY.

II. OF THE HOMESTEAD.

III. OF THE HOMESTEAD OF INSANE PERSONS.

IV. OF DOWER.

ARTICLE I.

OF THE PROVISION FOR THE SUPPORT OF THE FAMILY.

§ 129. Widow and children may remain in homestead, etc.

§ 130. All property exempt from execution to be set apart for use of family.

§ 131. May make extra allowance.

§ 132. Payment of allowance.

§ 133. Property set apart, how apportioned between widow and children.

§ 134. Estates less than fifteen hundred dollars to go to wife and child; those less than three thousand to be summarily administered.

§ 135. When all property to go to children.

§ 129. [1464.] Widow and Children may Remain in Homestead, etc. — When a person dies leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent, and are also entitled to a reasonable provision for their support, to be allowed by the superior court, or a judge thereof.

Arizona. — Same. Rev. Stats., sec. 1093.

Idaho. — Same. Rev. Stats., sec. 5440.

Montana. — Same. Comp. Stats., p. 305, sec. 133.

Nevada. — Same. Gen. Stats., sec. 2789.

Oregon. — Same. Hill's Laws, sec. 1126.

Utah. — Same, with name of court changed. Comp. Laws, sec. 4113.

Washington. — "When a person shall die leaving a widow or minor child or children, the widow, child, or children shall be entitled to remain in possession of the homestead, and of all the wearing apparel of the family, and of all the household furniture of the deceased." Code Proc., sec. 972.

Wyoming. — Same as California, except that court or commissioner may also act. Laws 1890-91, p. 266, sec. 1.

Form No. 80.—Order Providing for Support of Family until Return of Inventory.

[Title of Court and Estate.]

It appearing that — died on or about the — day of —, A. D. 18—, and at the time of his death was a resident of this county, and that a petition has been filed herein praying that letters of administration upon his estate be issued to —, his widow; and it appearing that the widow and minor children of deceased have no sufficient income for their support until the return of the inventory herein; and it appearing that the sum of fifty dollars per month is a reasonable sum for that purpose to be appropriated out of the property of said estate;—

It is ordered that the sum of fifty dollars per month be allowed to said widow until the return of the inventory herein with which to support herself and the minor children of said deceased.

—, Judge of the — Court.

Dated —.

§ 130. [1465.] Disposition of Exempt Property.—

Upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion or on petition therefor, set apart for the use of the surviving husband or wife, or in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated, and recorded; provided such homestead was selected from the common property, or from the separate property of the persons selecting or joining in the selection of the same. If none has been selected, designated, and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children; or if there be no surviving husband or wife, then for the use of the minor children, in the manner provided in Article II. of this chapter, out of the common property, or if there be no common property, then out of the real estate belonging to the decedent.

For Article II. of this chapter, see §§ 136-142, *post*.

Arizona. — First sentence same as first sentence of California section, to the word "provided," except that the phrase "in case of his or her death to" is omitted. Balance of section as follows: "If none has been selected, designated, and recorded, the judge of the court must select, designate, set apart, and cause to be recorded a homestead for the use of the persons hereinbefore named, in the manner provided in article two of this chapter, out of the real estate belonging to the decedent." Rev. Stats., sec. 1094.

Idaho. — Same as Arizona, except that the words "article two of" are omitted. Rev. Stats., sec. 5441.

Montana. — Same as Idaho. Comp. Stats., p. 306, sec. 134.

Nevada. — "Upon the return of the inventory, or at any subsequent time during the administration, the court or probate judge may, of his own motion or on application, set apart for the use of the family of the deceased all personal property which is by law exempt from execution, and the homestead as designated by the general homestead law, or by section one hundred and twenty-six (126) of this act." Rev. Stats., sec. 2790.

The section referred to is as follows: "If there is no law in force exempting property from execution, the following shall be set apart for the use of the widow, or minor child or children, and shall not be subject to administration: 1. All spinning-wheels, weaving-loom, and stoves put up or kept for use; 2. The family Bible, family pictures, and school-books and library, not exceeding in value two hundred dollars; 3. All sheep to the number of twenty, with their fleeces, and the yarn or cloth manufactured from the same, two cows, five swine, with the necessary food for them for six months; 4. All wearing apparel of the widow and children, and all household goods, furniture, and utensils, not exceeding in value seven hundred and fifty dollars; 5. The homestead, consisting of any quantity of land not exceeding twenty acres, and the dwelling-house thereon, with its appurtenances, not being included in any incorporated town or city; or instead thereof, a quantity of land not exceeding one lot in any incorporated town or city, and the dwelling-house thereon and its appurtenances, to be selected by the widow, or if there be no widow, to be designated by the probate judge, and not to exceed in any case more than five thousand dollars in value." Rev. Stats., sec. 2793.

"The homestead set apart by the husband and wife, or either of them, before his death, and such other property as may be exempt by law from execution or forced sale, shall be set apart for the use of the widow and minor heirs, and if no minor heirs, for the use of the widow." Rev. Stats., sec. 509. See also § 133, *post*.

Oregon. — "Upon the filing of the inventory, the court, or judge thereof, shall make an order setting apart for the widow or minor children of the deceased, if any, all the property of the estate by law exempt from execution. The property thus set apart, if there be a widow, is her property, to be used or expended by her in the maintenance of herself and minor children, if any, or if there be no widow, it is the property of the minor child; or if more than one, of the minor children, in equal shares, to be used or expended in the nurture and education of such child or children, by the guardian thereof, as the law directs." Hill's Laws, sec. 1127.

Utah. — "Upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion, or on petition therefor, set apart for the use and support of the widow and minor children of the decedent, if there be a widow and minor children, and if no widow, then for the children, if there be any, and if no children, then for the widow, all the property of the decedent exempt from execution." Comp. Laws, sec. 4114.

Washington. — "In case of the appointment of an executor or administrator upon the death of the husband, as mentioned in the last preceding section, the court shall, without cost to the widow, minor child or children, set apart for the use of such widow, minor child or children, all the property of the estate by law exempt from execution." Code Proc., sec. 973.

"And if the head of the family in his lifetime had not complied with the provisions of the law relative to the acquisition of a homestead, the widow, or the child or children, may comply with such provisions, and shall be entitled on such compliance to a homestead, as now provided by law for the head of a family, and the same shall be set aside for the use of the widow, child or children, and shall be exempt from all claims for the payment of any debt, whether individual or community. Said homestead shall be for the use and support of said widow, child or children, and shall not be assets in the hands of any administrator or executor for the debts of the deceased, whether individual or community." Code Proc., sec. 972. See last section.

Wyoming. — Same as California, except that the words "in the manner provided in article II. of this chapter" are omitted. Laws 1890-91, p. 267, sec. 4.

The provisions of sections 1465 and 1466, Code of Civil Procedure of California, are independent of the action of the deceased, as expressed in his will, and of creditors, heirs, and legatees, so far that, when the necessity exists, the court may provide for the support of the family until, in course of administration, they can receive the share of the estate to which they are entitled, subject to the proviso that if the estate is insolvent such provision shall not extend beyond one year: *In re Walkerley*, 77 Cal. 642; *In re Ballentine*, Myr. Prob. 86; *In re Burns*, Myr. Prob. 155. See §§ 131 et seq., *post*; also Cal. Code Civ. Proc., secs. 1237 et seq.

The order setting apart the homestead must be recorded: See § 137, *post*.

If the homestead be carved out of the husband's property, he still has the power of alienating it, subject to the joint use of the property as a homestead by himself and wife: *Gee v. Moore*, 14 Cal. 472.

Upon the return of the inventory, or at any subsequent time dur-

ing the administration of an estate, if no homestead has been selected, designated, and recorded, the court must, on its own motion, or on petition therefor, select, designate, set apart, and cause to be recorded a homestead for the use of the surviving husband or wife and the minor children, or if there be no surviving husband or wife, then for the use of the minor children; "and when an application is made that a homestead be so set apart, the court has no discretion in the matter, but must grant the application": *In re Ballentine*, 45 Cal. 696. And the power or duty of the court in this respect is not limited by the fact that the decedent left a will by which he disposed of the property sought to be set aside; the power of testamentary disposition of property being not paramount but subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children: *Sulzberger v. Sulzberger*, 50 Cal. 387; as well as for the payment of the debts

of the estate: *Davis v. Stephens*, 69 Cal. 458.

The homestead act of 1860 was a statute of descent: *Rich v. Tubbs*, 41 Cal. 34. Under it no rights vested in the children until the death of one of the spouses, and therefore no change was made in their estate or rights, nor were they destroyed by the act of 1862 vesting the homestead absolutely in the surviving spouse: *Herrold v. Reen*, 58 Cal. 443; *In re Delaney*, 37 Cal. 177.

The power granted to the court under the above section to set apart a homestead may be exercised, notwithstanding the fact that "the manner provided in article two," mentioned in that section, has been abrogated by the legislature. This defect in the law is supplied by section 187, Code of Civil Procedure, which authorizes the court to adopt any "manner" it may deem proper in the exercise of its power: *Mawson v. Mawson*, 50 Cal. 541; *In re McCauley*, 50 Cal. 544.

Setting apart property as a homestead does not affect any liens (*In re McCauley*, 50 Cal. 546) which are upon the property, but the holders thereof can proceed and enforce the lien as if the order had never been made, with the single exception mentioned in § 137, *post*; nor does it affect the claim of title of any person having an interest in the land adverse to the estate of the decedent, for the very obvious reason that such claimant has not had a day in court, and that the superior court when acting as a court of probate has no jurisdiction to adjudicate upon the title: *Herrold v. Reen*, 58 Cal. 443; *Watson v. Creditors*, 58 Cal. 556; *In re Burton*, 63 Cal. 36; *Chalmers v. S. B. & L. Soc.*, 64 Cal. 77; *In re Burton*, 64 Cal. 423; *Bath v. Valdez*, 70 Cal. 360; *Rich v. Tubbs*, 41 Cal. 34; *In re James*, 23 Cal. 417.

Personal property exempt from execution is set apart to widow subject to existing liens: *In re Fleury*, Myr. Prob. 227.

A superior court in probate proceedings may examine into the title of real estate belonging to the deceased for the purpose of selecting a homestead: *In re Burton*, 64 Cal. 428; but cannot determine the title as between adverse claimants: *In re Burton*, 64 Cal. 428; *In re Burton*, 63 Cal. 36.

The court cannot in such proceedings pass upon the validity of mortgages upon the property. Such questions must be tested in foreclosure proceedings: *Chalmers v. S. B. & L. Soc.*, 64 Cal. 77.

The marriage of a widow destroys her right to have a homestead set apart to her out of the estate of her former husband: *In re Boland*, 43 Cal. 640.

If a widow has a homestead set apart to her out of her deceased husband's estate, and then remarries, upon the death of her second husband she becomes entitled to a homestead out of his estate also: *Higgins v. Higgins*, 46 Cal. 259.

A homestead should not be set aside to a wife who is living separate and apart from her husband at the time of his death, because of her notorious unfaithfulness to him: *In re Cameto*, Myr. Prob. 42.

On an application to set apart a homestead, it appeared that petitioner was the child of a woman who was divorced from her husband. It did not appear that at the time of his birth his mother had separated from her husband, and was living with deceased, nor was there any evidence of his adoption by the latter. Held, that the petitioner must be taken to be the child of the lawful husband, and therefore not entitled to the order claimed: *In re Romero*, 75 Cal. 379.

A homestead for a widow, there being no children, was set apart out of the separate property of decedent. It had never been improved or resided upon. All the heirs except the widow were non-residents, and petitioned the court to vacate the order setting such homestead apart, and to have it included in an accounting by the administratrix, all of which was denied: *In re Burns*, Myr. Prob. 155; affirmed 54 Cal. 223, on the ground that the order had not been appealed from.

The homestead must be selected out of the community property, if there be any: *Lord v. Lord*, 65 Cal. 84. But it may be set apart out of the separate property of a deceased husband when there is no community property: *Lord v. Lord*, 65 Cal. 84; *Mawson v. Mawson*, 50 Cal. 541.

A valid homestead selected by a husband from his separate property

vests absolutely in his widow upon his death: *In re Croghan*, 92 Cal. 370.

When a homestead has been selected by one spouse out of the separate property of the other, without the consent of the latter, then upon the death of the latter the homestead property vests in his or her heirs, subject to the power of the court to assign it for a limited period to the family of the decedent, but if the latter spouse joined in such selection, such property goes absolutely to the survivor: *In re Croghan*, 92 Cal. 370.

A homestead free of encumbrances is to be set apart to the widow when the estate is solvent: See § 137, *post*; but when there are not sufficient assets out of which to pay the debts of decedent, and costs, etc., of administration, then claims which are liens upon the homestead, must be presented as are other claims, and will be paid *pro rata*, as other debts, after which the balance may be collected out of the homestead property: *Lord v. Lord*, 65 Cal. 84; *Mawson v. Mawson*, 50 Cal. 541; *Camp v. Grider*, 62 Cal. 20.

The effect of setting a homestead apart to the use of the family of decedent is to withdraw it from further answering to claims against the estate of which it was before that time a part: *In re Orr*, 29 Cal. 101; *Rich v. Tubbs*, 41 Cal. 34; *Schadt v. Heppie*, 45 Cal. 433; *In re Hardwick*, 59 Cal. 292; *In re Burton*, 63 Cal. 36.

Probate court loses jurisdiction over the homestead after it is set aside to the family of decedent: *In re Rondel*, Myr. Prob. 70.

As to the vesting of title to the homestead, see §§ 133, 136, 366, *post*; also *Lord v. Lord*, 65 Cal. 84.

During the husband's lifetime he, jointly with his wife, recorded a declaration in due form, claiming as a homestead a tract of land upon which there were two houses, one of which he occupied with his family, together with five acres of land; the balance of the tract claimed as a homestead was occupied by a tenant, to whom it had been leased by the ancestor of the deceased. The decedent had inherited the land from his said ancestor, but had never been in possession of it except by his tenant, and he (the homestead claimant) died prior to the ex-

piration of the tenant's lease. Under such circumstances, it was held that the widow was entitled to have set aside to her as a homestead, under the provisions of the above section, only the house in which she and her husband had lived, and the five acres on which it was situated: *In re Crowley*, 71 Cal. 300, and cases there cited.

Partnership property cannot be set aside as a homestead to the widow of a deceased partner: *Kingsley v. Kingsley*, 39 Cal. 665.

No homestead can be set apart to the widow where deceased leaves no community property, and no separate property except a business block valued at twenty-five thousand dollars, which could not be divided without material loss, although no homestead was set apart during the lifetime of deceased because the real property in question was of such a nature that it could not have been selected as a homestead during the lifetime of deceased: *In re Noah*, 73 Cal. 590.

Property in part used for purposes other than a homestead, but included in declaration, cannot be set apart by decree as a probate homestead: *In re Reck*, Myr. Prob. 59; *In re Camelo*, Myr. Prob. 42.

In an application to set aside a homestead, where the court refused to make the order, the applicant is entitled to findings, and it was error for the court to enter judgment without them: *In re Burton*, 63 Cal. 36.

A decree refusing to set aside a homestead must be appealed from within sixty days from its entry: *In re Harland*, 64 Cal. 379; *In re Burton*, 64 Cal. 428.

The court will protect the interest of minor children upon application of the widow for a homestead, though made upon her behalf only: *In re Moore*, 57 Cal. 437.

Where no homestead has been selected and recorded during the lifetime of the decedent, it is the duty of the court to designate and set apart a homestead out of the community property, if there is any such, and if not, then for a limited period out of any separate property of the decedent suitable for the purpose; and though the husband could not have selected a homestead out of his wife's separate

property without her consent when living, this does not affect the power of the court to set it apart to him as such for a limited period after her death: *In re Lahiff*, 86 Cal. 151.

When no homestead was selected during the lifetime of the decedent, the court is authorized to set one apart for the use of the surviving spouse, although there are no minor children: *In re Armstrong*, 80 Cal. 71.

The court cannot set apart as a homestead different tracts of land which are separated one from the other by a distance of fifty miles: *In re Armstrong*, 80 Cal. 71.

No property can be set apart by the probate court as a homestead out of the estate of a deceased person which could not have been dedicated as such under the homestead act immediately preceding the death of the deceased: *In re Ackerman*, 80 Cal. 208.

An order setting apart a homestead in the community property pending administration relieves it from administration and excludes it from distribution, but does not affect the title to the homestead. If no homestead was declared during the existence of the community, the community property vests according to section 1402 of the California Civil Code (§ 481, *post*), regulating succession thereto, subject, however, to its temporary use as a homestead under the order of the court setting it apart for that purpose: *In re Gilmore*, 81 Cal. 240.

A probate homestead set apart by the court under sections 1465, *supra*,

and 1468 (§ 133, *post*) of California Code of Civil Procedure, is not limited to five thousand dollars in value; and the presumption is, that the court will give the family such a one as is just and proper, considering the amount and condition of the estate; the matter of value of such a homestead is within the discretion of the superior court, which will not be interfered with by the appellate court, unless it appears that such discretion has been abused: *In re Walkerley*, 81 Cal. 579.

A wife is not entitled to a family allowance if she has voluntarily entered into a valid agreement with her husband for separation, whereby, in consideration of certain money paid, she waived all other claims upon her husband, and has voluntarily continued to live apart from him, without any attempt to set aside the agreement, or to assume again their matrimonial relation, or to demand further means for her separate support: *In re Noah*, 88 Cal. 468.

Where the heirs had notice of the application for a homestead, and the estate has been fully administered, their complaint in an action to set aside the decree, which fails to show any fraud or device which would prevent proof of the character of the property from which the homestead was selected, does not show a cause of action, though it shows that the homestead was falsely set aside as community property, and as the sole and separate estate of the widow, when the property was in fact the separate property of the husband: *Gruwell v. Seybolt*, 82 Cal. 7.

Form No. 81. — Petition for Order Setting Apart Personal Property.

[Caption, Form No. 1, § 5, *ante*.]

1. That on the — day of —, A. D. 18—, the inventory and appraisement of the property of the estate of —, deceased, was returned to this court;

2. That the following described personal property is returned in said inventory as the property of said estate, viz. (here insert list of property);

3. That said property is exempt by law from execution; —

Wherefore petitioner prays that all of said personal property

be set apart out of said estate for the exclusive use and benefit of the widow and children of decedent. —, Petitioner.

—, Attorney for Petitioner.

Form No. 82.—Petition to Set Apart Homestead.

[Caption, Form 1, § 5, *ante*.]

1. (Follow subd. 1 of Form No. 81.)

2. That the following described real property is returned in said inventory as the property of said estate (here insert description of property), and in said inventory said real property is valued at the sum of \$—;

3. That said real property was and is the community property of deceased and —, his widow, having been acquired by them during their marriage;¹

4. That a declaration of homestead was duly filed upon said property during said marriage and in the lifetime of decedent by —; that said declaration of homestead was duly acknowledged, and was recorded on the — day of —, A. D. 18—, in Book — of Homesteads, page —, in the records of the — county of —, state of —, a copy of which said declaration of homestead is attached hereto and made a part hereof;²—

Wherefore petitioner asks that said property be set apart for the exclusive use and benefit of the widow of deceased.³

—, Petitioner.

—, Attorney for Petitioner.

¹ In case it is the separate property of deceased, this allegation should read as follows: 3. That said real property was and is the separate property of deceased.

² In case no declaration of homestead has been filed during the lifetime of decedent, this allegation should read as follows: 4. That no homestead was ever designated or selected by the deceased or his widow during his lifetime.

³ If the property is community property, or if it was separate property and the declaration was filed by the spouse to whom it belonged, either separately or jointly with the other spouse, the prayer should be as above set forth (§ 130, *ante*), but if no homestead has been selected during the lifetime of decedent, and there is no real property belonging to the community, or if the homestead was selected by the surviving spouse out of the separate property of the decedent, and decedent did not join therein, the prayer should be as follows: Wherefore petitioner prays the court to select, designate, and set apart, and cause to be recorded, a homestead out of said property for the use of the surviving husband (or wife) and the minor children of decedent for the period of — years.

Form No. 83. — Order Setting Apart Homestead.

[Title of Court and Estate.]

It appearing to the court that the real property hereinafter described is returned in the inventory as the property of the estate of —, deceased; that said real property is valued in said inventory at the sum of \$—; that said real property was and is the community property of said —, deceased, and —, his widow, having been acquired by them during their marriage (or that said real property was and is the separate property of deceased); that a declaration of homestead in proper form was duly filed, claiming said property as a homestead; that said declaration was filed in the lifetime of decedent by —, and during said marriage; that it was duly acknowledged and was recorded on the — day of —, A. D. 18—, in Book — of Homesteads, page —, in the records of the — county of —, state of —; —

It is therefore ordered that said real property, to wit (here insert description), be and the same is hereby set apart to the exclusive use and benefit of the widow and minor children of deceased, to wit (here name the widow and minor children). —, Judge of the — Court.

Dated —, 18—.

NOTE. — For variations of this form to conform to different phases of the law, see §§ 130, *supra*, and 131, *post*, and notes to Form No. 82, § 130.

§ 131. [1466.] May Make Extra Allowance. — If the amount set apart be insufficient for the support of the widow and children, or either, the court, or a judge thereof, must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate; which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration.

Arizona. — Same. Rev. Stats., sec. 1095.

Idaho. — Same. Rev. Stats., sec. 5442.

Montana. — Same. Comp. Stats., p. 306, sec. 135.

Nevada. — Same. Gen. Stats., sec. 2791.

Oregon. — "If the property so exempt is insufficient for the support of the

widow and minor children, according to their circumstances and condition in life, for one year after the filing of the inventory, the court, or judge thereof, may order that the executor or administrator pay to such widow, if any, and if not, then to the guardian of such minor children, an amount sufficient for that purpose; but such order shall not be made unless it appear probable that the estate is sufficient to satisfy all the debts and liabilities of the deceased, and pay the expenses of administration in addition to the payment of such amount." Hill's Laws, sec. 1128.

Utah.—Same as California, except that "or a judge thereof" is omitted. Comp. Laws, sec. 4115.

Washington.—Same as California; last clause omitted; also the words "or a judge thereof" are omitted. Code Proc., sec. 973.

Wyoming.—Same as California, except that the last clause is omitted. Laws 1890-91, p. 266, sec. 2.

An order refusing to make a family allowance out of the estate of a decedent is not erroneous, if it appears that a homestead had been set apart to the widow and children, and the petition for the family allowance fails to state that such homestead is insufficient for the support of the family: *In re Luther*, 67 Cal. 319.

Where it appears that the estate of a decedent still in process of settlement is solvent; that the small amount of personal property set aside to the widow does not afford her any income; that the allowance already made has become exhausted in supplying necessary wants; and that the widow is in poor health, and destitute, — a reasonable allowance ought to be made for the widow during the progress of the settlement of the estate: *In re Roberts*, 67 Cal. 349.

Family allowance should be refused to widow, where, after being married six weeks, she and deceased entered into an agreement of separation, she accepting ten thousand five hundred dollars in satisfaction of all marital claims, alimony, and support, after which she continued to live apart from him without any effort to set aside the agreement, and without making any further claim for support until his death. There was no issue of the marriage. After her husband deceased, she applied to the court for a reasonable allowance for the support of the family of decedent during the settlement of his estate. She was not his immediate family within the mean-

ing of the statute: *In re Noah*, 73 Cal. 583; 88 Cal. 468.

If the estate is insolvent, it is the duty of the court after one year from the granting of letters to discontinue the family allowance: *In re Montgomery*, 60 Cal. 648.

Widow of decedent is entitled to reasonable provision for support, and the court is not restricted to a bare support, but in making the allowance should take all the circumstances into consideration, and have regard to the mode in which she lived during the lifetime of the decedent, and the sufficiency of the estate to pay the amount allowed. She is not chargeable as executrix for profits received from the subletting of rooms in a house hired by her, the rental of which is paid out of her monthly allowance: *In re Stevens*, 83 Cal. 322.

Allowance to widow is not reviewable after the time has elapsed for appeal from the order, as it then becomes final, and the power of the court over it is at an end. The court below cannot sit as an appellate court to review its own orders, though it may be that if the court has been imposed upon it can change the order to make it conform to a fair determination, on facts studiously withheld being made to appear. But if it has only the same facts before it on which it at first acted, it cannot change or modify the order in settling the final account of the executrix: *In re Stevens*, 83 Cal. 322.

Form No. 84. — Petition for Family Allowance.

[Caption, Form No. 1, § 5, *ante*.]

The petition of — respectfully shows:—

That — died on or about the — day of —, A. D. 18—, and that the matter of said estate is now pending in this court;

That his widow is without estate of her own, and is entitled to an allowance out of the property of said estate, of a reasonable amount, for the maintenance of herself and the minor children of decedent, — in number, according to their circumstances and mode of life; that the property of said estate, exempt by law from execution, is not sufficient for the maintenance of such family; that — dollars is a reasonable amount for that purpose;—

Wherefore petitioner prays that an allowance of — dollars per month be made out of said estate for the maintenance and support of said widow and children, payable to said widow until the further order of this court.

Petitioner.

—, Attorney for Petitioner.

Form No. 85. — Order for Family Allowance and Setting Apart Property Exempt from Execution.

[Title of Court and Estate.]

An application having been made to this court for an order setting apart for the benefit of the family of the above-named decedent all of the property of said decedent which was by law exempt from forced sale and execution, and it appearing that the inventory of the property of the estate of said decedent has been duly returned and filed in this court, and it appearing therefrom that the property hereinafter described and mentioned therein is such exempt property; and it further appearing that said family have no income, and that said exempt property is insufficient for their support, and that the sum of fifty dollars per month is a reasonable amount for said purpose;—

It is therefore ordered that the following described real and personal property be and the same is hereby set apart for the use and benefit of —, the widow of said deceased, and his minor children (here insert description of said real and personal property);

And it is further ordered that the sum of fifty dollars per month be and the same is hereby allowed and directed to be paid by the administrator to said widow for the support of herself and said minor children from the return of the inventory herein until the further order of this court.

Dated —, 18—.

Judge of the — Court.

NOTE. — If no allowance has been made prior to the return of the inventory, the order may direct that the allowance be made from the date of the death of decedent. If estate is insolvent, the allowance should be limited to the period of one year.

§ 132. [1467.] Payment of Allowance. — Any allowance made by the court or judge, in accordance with the provisions of this article, must be paid in preference to all other charges, except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent.

Arizona. — Same. Rev. Stats., sec. 1096.

Idaho. — Same. Rev. Stats., sec. 5443.

Montana. — Same. Comp. Stats., p. 306, sec. 136.

Nevada. — Same, except that the last three lines are omitted. Gen. Stats., sec. 2792.

Utah. — Same as California. Comp. Laws, sec. 4116.

Washington. — Same as Nevada. Code Proc., sec. 974.

Wyoming. — Same as California. Laws 1890-91, p. 267, sec. 3.

§ 133. [1468.] Property, how Apportioned. — When property is set apart to the use of the family in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children if there be more than one. If there be no widow or surviving husband, the whole belongs to the minor child or children. If the property set apart be a homestead selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order.

Arizona. — Same; last sentence omitted. Rev. Stats., sec. 1097.

Idaho. — Same as California. Rev. Stats., sec. 5444.

Montana. — Same as Arizona. Comp. Stats., p. 306, sec. 137.

Nevada. — Same as Arizona, except that "surviving husband" is omitted from the section. Gen. Stats., sec. 2794.

"Provided, that if the property declared upon as a homestead be the separate property of either spouse, both must join in the acknowledgment and execution of the declaration; and if such property shall retain its character of separate property until the death of one or the other of such spouses, then and in that event the homestead right shall cease in and upon said property, and the same belong to the party (or his or her heirs) to whom it belonged when filed upon as a homestead." Gen. Stats., sec. 539.

"The homestead and all other property exempt from law from the sale under execution shall, upon the death of either spouse, be set apart by the court as the sole property of the surviving spouse, for his or her benefit and that of his or her legitimate child or children; and in the event of there being no surviving spouse or legitimate child or children of either, then the property shall be subject to administration, and to the payment of his or her debts and liabilities; provided, that the exemption made by this act and the act of which it is amendatory shall not extend to unmarried persons, except when they have the care and maintenance of minor brothers or sisters, or both, or of a brother's or sister's minor children, or of a father or mother, or of grandparents, or unmarried sisters living in the house with them; and in all such cases the exemption shall cease upon the cessation of the terms upon which it is granted; and upon the death of such unmarried person the property shall descend to his or her heirs as in other cases, unless disposed of by will, subject to administration and the payment of debts and liabilities; and provided further, that no exemption to the surviving spouse shall be allowed in cases where the homestead declaration has been filed upon the separate property of either husband or wife." Gen. Stats., sec. 542.

Oregon. — See Hill's Laws, sec. 1127, under § 130, *ante*.

Utah. — Same as California, except that the last sentence and "surviving husband" are omitted. Comp. Laws, sec. 4117.

Washington. — Same as Utah. Code Proc., sec. 975.

"If intestate leave no widow or minor children, all his estate shall be assets in the hands of the administrator, after payment of funeral expenses and expenses of administration, for the payment of the debts of the deceased, or distribution according to law." Code Proc., sec. 976.

"When any person dies seised of a homestead, leaving a widow or husband or minor children, the survivors shall be entitled to the homestead; but in case there be neither surviving husband, widow, or children, the said homestead shall be liable for the debts of the deceased." Code Proc., sec. 482.

Wyoming. — Same as California; last sentence omitted. Laws 1890-91, p. 267, sec. 5.

The wife, if surviving her husband, takes the homestead as property set apart by law from her husband's estate, for her benefit and for the benefit of her children, if there be any: *Gee v. Moore*, 14 Cal. 472.
The deed of an heir passes only rights given by succession, and not

rights given by the probate law: *In re Moore*, 57 Cal. 437, 446.

Property assigned for use and support of widow and minor children does not vest absolutely in the widow, but only gives to her the use thereof: *Rands v. Brain*, Utah Sup. Ct., June 13, 1887; also on rehearing, July 30, 1887.

A will whereby a testatrix authorizes the sale of all her property, and attempts to dispose thereof in the form of money bequests, her property consisting of the premises she and her husband had occupied as a homestead, though not then protected as such by selection and recording, does not operate as an actual conversion of the property into money,

and the beneficiaries take their interests subject and subordinate to all the contingencies of administration, and among others to the authority conferred by law upon the court to set the same apart for a limited period to the surviving husband as a homestead, as well as to appropriate the same for the payment of debts: *In re Lahiff*, 86 Cal. 151.

The power of the court to set apart a homestead from the separate property of the decedent, after her death, is not defeated by the action of the executor in negotiating a sale under a power contained in the will which is unconfirmed, before the decree setting apart the homestead is made: *In re Lahiff*, 86 Cal. 151.

§ 134. [1469.] Summary Administration.—If upon the return of the inventory of the estate of a deceased person it shall appear therefrom that the value of the whole estate does not exceed the sum of fifteen hundred dollars, and if there be a widow or minor children of the deceased, the court, or a judge thereof, shall, by order, require all persons interested to appear on a day fixed to show cause why the whole of said estate should not be assigned for the use and support of the family of the deceased. Notice thereof shall be given and proceedings had in the same manner as provided in sections sixteen hundred and thirty-three, sixteen hundred and thirty-five, and sixteen hundred and thirty-eight of this code. If upon the hearing the court finds that the value of the estate does not exceed the sum of one thousand five hundred dollars, it shall, by a decree for that purpose, assign for the use and support of the widow and minor children, if there be a widow and minor children, and if no widow, then for the children, if there be any, and if no children, then for the widow, the whole of the estate, after the payment of the expenses of the last illness of the deceased, funeral charges, and expenses of administration; and there must be no further proceedings in the administration, unless further estate be discovered.

For sections 1633, 1635, 1638, referred to in above section, see §§ 264, 266, 267, *post*.

Arizona.—Same, except that the estate must not be in excess of two thousand dollars. and the following is added: "And when it appears, on the return

of the inventory, that the value of the whole estate does not exceed the sum of three thousand dollars, it is in the discretion of the probate court to dispense with the regular proceedings, or any part thereof, prescribed in this title, except as herein provided, and there must be had a summary administration of the estate, and an order of distribution thereof, at the end of six months after the issuing of letters. The notice to creditors must be given to present their claims within four months after the first publication of such notice, and those not so presented are barred as in other cases." Rev. Stats., sec. 1098.

Idaho. — Same as Arizona, except that "fifteen hundred dollars" is substituted for "two thousand dollars," in the first part of section, and "fifteen hundred dollars" for "three thousand dollars," in the last part of section. Rev. Stats., sec. 5445.

Montana. — "If on the return of the inventory of the estate of an intestate it appears that the value of the whole estate does not exceed the sum of fifteen hundred dollars, the probate court, by a decree for that purpose, must assign for the use and support of the widow and minor child or children, if there be a widow or minor child, and if no widow, then for the children, if there are any, the whole of the estate, after the payment of the expenses of his last illness, funeral charges, and expenses of the administration, and there must be no further proceedings in the administration, unless further estate be discovered; and when it so appears that the value of the whole estate does not exceed the sum of three thousand dollars, it is in the discretion of the probate court to dispense with the regular proceedings, or any part thereof, prescribed in this title, and there must be had a summary administration of the estate, and an order of distribution thereof, at the end of six months after the issuing of letters. The notice to creditors must be given to present their claims within four months after the first publication of such notice, and those not so presented are barred as in other cases." Comp. Stats., p. 306, sec. 138.

"If it shall appear at the time of filing the inventory and appraisement that the estate of a deceased person does not exceed five hundred dollars, the probate judge shall thereupon make an order that the administrator may make final settlement of such estate at the end of six months from the date of such order. Notice of the making of such order, and of the time and place of such settlement, shall be forthwith made and published in the same manner and for the same length of time as now required for notice of final settlement. Such notice shall also state that letters testamentary or of administration have been granted, giving the date thereof, and that all persons having claims against the said estate are required to exhibit them for allowance on or before the day named therein for final settlement, and that if such claims be not thus exhibited they will be forever barred." Comp. Stats., p. 401, sec. 558.

"The administration of such estates shall in other respects be conducted in the same manner as now provided by law, except that if any part of such estate is real property, it shall be sold at the same time and in the same manner as the personal property." Comp. Stats., p. 401, sec. 559.

"At the time mentioned in said notice, or such further time as may be granted by the court, the administrator shall make final settlement of such estates. If creditors who have proved their claims are not present in court to receive their money at the time of making such settlement, the administrator

shall pay the same over to the probate judge, taking his receipt therefor, and thereafter the probate judge shall pay over such sum or sums to the proper claimant or claimants, upon demand." Comp. Stats., p. 401, sec. 560.

"For good cause shown, the probate judge may extend the time for making such final settlement, but in no case shall it be extended beyond one year from the date of issuance of letters of administration in such estates." Comp. Stats., p. 401, sec. 561.

Nevada. — "If on the return of the inventory of any intestate estate it shall appear that the value of the whole estate does not exceed the sum of five hundred dollars, the court or judge shall, by a decree or order for that purpose, assign for the use and support of the widow and minor children of the intestate, or for the support of the minor child or children if there be no widow, the whole of the estate, after the payment of the funeral charges and the expenses of the administration; and there shall be no further proceedings in the administration, unless further estate be discovered; and whenever it shall be made to appear, by affidavit or otherwise, that the value of the whole estate does not exceed the sum of two thousand dollars, it shall be in the discretion of the court or judge to dispense with the regular proceedings, or any part thereof, any or all notices, except notice to creditors, and to shorten the time of all notices prescribed by this act, for the purpose of a summary administration of the estate, and to order distribution of the estate at the end of the number of months the court or judge may order; *provided*, that notice to creditors shall have been given to present their claims within the number of months ordered by the court or judge. Any or all notices may be given for the time and in the manner ordered by the court or judge, except that notice to creditors shall be published, as often as the court or judge may order, in a newspaper published in the county, if the cost of such publication does not exceed five dollars, and unless otherwise ordered by the court or judge. No order or decree, except the decree of final settlement and discharge, shall be recorded at the expense of the estate; such order and decrees not so recorded may be filed in the clerk's office, where they shall remain, and have the same effect for all purposes as though recorded. The executor or administrator shall, without unnecessary delay after his appointment, give, either by publication in a newspaper published in the county, or in the manner ordered by the court or judge, the notice to creditors of the deceased requiring all persons having claims against the deceased to exhibit them, with the necessary vouchers, within the number of months ordered by the court or judge, specifying in such notice said number of months, at the place of his residence or transaction of business, to be specified in the notice; if the claim be not presented within such number of months, it shall be forever barred; *provided*, that all claims against deceased not due may be presented within said number of months specified in such notice with the same effect as though due when presented; every such claim which has been allowed by the executor or administrator, and approved by the judge, shall by the claimant or her attorney be filed with the clerk of the court within eight days after it is presented to the judge, and shall then, and not otherwise, be ranked among the acknowledged debts of the estate, to be paid in due course of administration; and the judge shall act

claim not so acted on by the judge within said five days shall be deemed to be rejected, and suit may be brought thereon accordingly. No fee or compensation whatever shall be charged or collected for the filing or registering any allowed and approved claim. Unless otherwise ordered by the court or judge, the fees and compensation to the clerk's office paid out of any estate shall not exceed the sum of fifteen dollars. The provisions of this act shall only apply to estates wherein a summary administration is ordered, and to estates wherein it appears from the inventory that the value of the whole estate does not exceed the sum of five hundred dollars." Rev. Stats., sec. 2795.

Oregon. — "If from the inventory of an intestate's estate who died leaving a widow or minor children it appears that the value of the estate does not exceed one hundred and fifty dollars over and above property exempt from execution, upon the filing of the inventory the court or judge thereof shall make a decree providing that the whole of the estate, after the payment of funeral expenses and expenses of administration, be set apart for such widow or minor children in like manner and with like effect as in case of property exempt from execution. There shall be no further proceeding in the administration of such estate, unless further property be discovered." Hill's Laws, sec. 1129.

Utah. — Same as California, with the following added: "Provided, that the title to all property assigned under the provisions of this section shall rest [vest] absolutely and equally in the persons to whom such property has been assigned." Comp. Laws, sec. 4118.

Washington. — "If by the return of the inventory of the estate of any intestate who died leaving a widow or minor children it shall appear that the value of the estate does not exceed one thousand dollars, the court shall, by decree for that purpose, assign for the use and support of the widow and minor children of the [int]estate, or for the support of the minor child or children if there be no widow, the whole estate, after the payment of the funeral expenses and expenses of administration; and there shall be no further proceedings in the administration, unless further estate be discovered." Code Proc., sec. 971.

Wyoming. — Same as California, except that for the second sentence the following is substituted: "Notice thereof shall be given and proceedings had in the same manner as provided for settlement of accounts and partial distribution of estates." Laws 1890-91, p. 267, sec. 6.

Where the inventory showed the estate to be of less value than fifteen hundred dollars, the court set it aside for the use and benefit of the minor children. Upon motion of a general creditor to set the order aside, it was held that notice to general creditors was not necessary; that the proceedings were regular; that the court having found that due notice of the application to set aside the estate had been posted, and that the estate did not exceed fifteen hundred dollars

in value, its judgment cannot be interfered with: *In re Palomares*, 63 Cal. 402.

An order of court setting aside a parcel of land for the support of minor children of a decedent under the above section does not divest the lien of a mortgage given by the decedent to secure the payment of the purchase money of the land: *Fainbanks v. Robinson*, 64 Cal. 250; *Chalmers v. S. B. & L. Soc.*, 64 Cal. 77.

Form No. 86. — Decree Directing Summary Administration.

(Used in Montana only.)

[Title of Court and Estate.]

The inventory and appraisement of the above-named estate having been filed herein, and it appearing that the total value of the estate at the time of filing said inventory and appraisement did not exceed the sum of five hundred dollars, but that said estate at said time was of the value of — dollars, and no more, it is therefore ordered that a summary administration of said estate be had, and that the administrator may make final settlement of such estate at the end of six months from the date of this order. —, Judge of the Probate Court.

Dated —, 18—.

Form No. 87. — Notice to Creditors, and of a Summary Administration.

Notice is hereby given to the creditors of, and all persons having claims against, the estate of —, deceased, to present their claims against said estate to —, to whom letters of administration (letters testamentary) upon said estate have been duly granted and issued by the probate court of the county of —, Montana, at —;

Notice is further given that the said letters are dated on the — day of —, A. D. 18—; that a summary administration of said estate has been ordered by said court, a copy of which order is as follows (here insert copy of order, Form No. 86, *ante*, of this section);

And notice is further given that in pursuance of said order, I will make final settlement of said estate on the — day of —, A. D. 18—, and all persons having claims against the said estate are required to exhibit them for allowance to said administrator (executor) on or before said — day of —, 18—, and all claims which are not thus exhibited will be forever barred.

—, (Executor), Administrator of the estate of —, Deceased.

Dated —, 18—.

Form No. 88. Order to Show Cause why the Whole Estate should not be Assigned to the Widow, etc.

[Title of Court and Estate.]

It appearing that the inventory and appraisement of the property of the estate of the above-named decedent has been duly returned and filed herein, and it appearing therefrom that the entire estate does not exceed in value the sum of — dollars, but that it is valued at the sum of — dollars, and it appearing that — is the widow of said decedent, and — and — are the minor children of decedent;—

It is therefore ordered that all persons interested in said estate appear before this court (or before —, judge of this court in chambers) on the — day of —, A. D. 18—, at the hour of — o'clock, A. M., of said day, then and there to show cause why the whole of the estate of —, deceased, should not be assigned for the use and support of the family of said decedent.

Dated —, 18—. —, Judge of the — Court.

Form No. 89.— Notice of Petition to Set Aside the Entire Estate for the Benefit of Family.

[Title of Court and Estate.]

Notice is hereby given that —, administrator (or executor) of the estate of —, deceased (or —, widow of —, deceased), will apply to the — court of the — county of —, on the — day of —, A. D. 18—, at ten o'clock, A. M., of said day, for an order to set aside the whole of said estate to the family of deceased.

—, Clerk.

Dated —, 18—.

Form No. 90.— Order Assigning the Whole Estate to Widow, etc.

[Title of Court and Estate.]

Whereas the inventory and appraisement of the property of the estate of the above-named decedent has been heretofore duly returned and filed herein; and whereas it appeared therefrom that the whole estate of said deceased did not exceed in value the sum of — dollars; and whereas it appeared that the decedent had left a widow and minor children; and whereas thereupon this court issued its order requiring all persons interested in said estate to appear and show cause why the whole

estate should not be assigned to the family of decedent, and said matter coming on regularly for hearing this day, and it appearing that the facts above recited are true, and it being proven that due and legal notice of this proceeding has been given to all persons interested in said estate, and no sufficient cause being shown why said property should not be so assigned, and it appearing that the family of decedent consists of the following persons, viz., —, his widow, and — and —, his minor children; and it appearing that the expenses of the last illness of deceased, all funeral charges, and all expenses of administration are paid;—

It is ordered that the whole of the estate of said decedent be assigned to said —, —, and —; the said property of said estate is as follows (here insert description).

Dated —, 18—. —, Judge of the — Court.

§ 135. [1470.] When Property to Go to Children.

—If the widow has a maintenance derived from her own property equal to the portion set apart to her by the preceding sections of this article, the whole property so set apart, other than the homestead, must go to the minor children.

Arizona. — Same. Rev. Stats., sec. 1099.

Idaho. — Same, except that the words "her half of" are interpolated after the word "than." Rev. Stats., sec. 5446.

Montana. — Same as California. Comp. Stats., p. 307, sec. 139.

Nevada. — "If the widow has a maintenance derived from her own property equal to the portion set apart to her by the one hundred and twenty-fifth and one hundred and twenty-sixth sections of this act [Gen. Stats., secs. 2792, 2793, under § 130, *ante*], the whole property so set apart shall go to the minor children." Gen. Stats., sec. 2796.

Utah. — Same as California. Comp. Laws, sec. 4119.

Wyoming. — Same as California. Laws 1890-91, p. 268, sec. 7.

ARTICLE II.

OF THE HOMESTEAD.

- § 136. Rights of survivor to homestead.
- § 137. Homestead set off—Subsisting liens to be paid.
- § 138. Duty of appraisers.
- § 139. Report of appraisers.
- § 140. Day to be set for hearing report.
- § 141. Right of grantee to homestead—Costs.
- § 142. Certified copy of order to be recorded.

§ 136. [1474.] Rights of Survivor to Homestead.

— If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the superior court to assign it for a limited period to the family of the decedent. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the Civil Code.

Arizona. — Same, except that in first sentence the clause concerning separate property is omitted, and in second sentence the words "without his or her consent" are omitted. Rev. Stats., sec. 1100.

Idaho. — Same as California. Rev. Stats., sec. 5447.

Montana. — Same as Arizona. Comp. Stats., p. 307, sec. 140.

Washington. — "When any person dies seised of a homestead, leaving a widow or husband or minor children, the survivors shall be entitled to the homestead; but in case there be neither surviving husband, widow, or children, the said homestead shall be liable for the debts of the deceased. Gen. Stats., sec. 482.

Wyoming. — Same as California to the words "husband and wife," in last sentence; balance omitted. Laws 1890-91, p. 268, sec. 8.

Homesteads, Setting Apart: See § 130, *ante*, and notes; also § 366, *post*.

A homestead of less value than that specified in the statute, when selected under the above section, and § 138, *post*, will, as against the heirs of the husband, vest in the wife absolutely upon his death, although at the time of his death such homestead was worth much more than that amount: *In re Burdick*, 76 Cal. 639.

Widow's right to homestead cannot be cut off by a general judgment lien on the land on which decedent resided at the time of his death. The failure of the husband in his lifetime to comply with the law to acquire such homestead does not debar his widow and children of such right if they lived

on the land at the time of his death and since: *McMillan v. Mau*, 1 Wash. 26.

Homestead declaration of wife alone on separate property of husband does not affect the title of the heirs to the property, but it vests in them on the death of the husband, subject only to the right of the court to set aside a homestead for a limited period to the surviving wife and children: *Gruwell v. Seybolt*, 82 Cal. 7.

A homestead out of separate property of a decedent can only be set apart to the widow for a limited time, and certainly not longer than during her life: *Hutchinson v. McNally*, 85 Cal. 619.

The title to a homestead declared on community property vests

absolutely in the surviving wife upon death of husband; and an order of court made in the matter of the husband's estate, purporting to set aside the homestead property "for the use of the family," does not in any way change or affect her rights as survivor, but merely excludes the property from administration: *Bollinger v. Manning*, 79 Cal. 7.

Community property duly dedicated as a homestead upon the death of one of the spouses becomes the sole property of the survivor, and is protected as such to the survivor in the same manner as before it had been protected to the community by its

homestead character: *Sanders v. Russell*, 86 Cal. 119.

Upon the death of either spouse, a homestead declared upon community property vests absolutely in the survivor, still retaining its homestead characteristics; and if the survivor afterwards sell the same, he is not entitled to have another homestead set apart to him out of the separate property of the deceased: *In re Ackerman*, 80 Cal. 208.

The law in force at time of death, and not that which was in force at the time of the declaration, controls the subject of homesteads and the rights of survivors: *Gruwell v. Seybolt*, 82 Cal. 7.

§ 137. [1475.] Homestead Set Off, Subsisting Liens to be Paid. — If the homestead selected and recorded prior to the death of the decedent be returned in the inventory appraised at not exceeding five thousand dollars in value, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the superior court must, by order, set it off to the persons in whom title is vested by the preceding section. If there be subsisting liens or encumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed, and the liens or encumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment.

Arizona. — Same, except the value must be four thousand dollars. Rev. Stats., sec. 1101.

Idaho. — "If the homestead selected and recorded prior to the death of the decedent is returned in the inventory appraised at not exceeding five thousand dollars in value, the probate court must, by order, set it off to the persons in whom title is vested by the preceding section. If there are subsisting liens or encumbrances on the homestead, they must be paid out of the funds of the estate, if there remain sufficient for that purpose after the payment of all claims allowed against the estate." Rev. Stats., sec. 5448.

Montana. — Same as California, except that value is two thousand five hundred dollars. Comp. Stats., p. 307, sec. 141.

Wyoming. — Same as California, except that in lieu of the first sentence

the following is inserted: "If the homestead held prior to the death of the decedent be returned in the inventory appraised at not exceeding fifteen hundred dollars in value, the court or judge must, by order, set it off to the persons in whom title is vested by the preceding section." Laws 1890-91, p. 268, sec. 9.

If a homestead is mortgaged to secure a claim against a decedent, such claim must be presented to the administrator or executor notwithstanding the general language of § 154, *post*. It is an exception to the rule, made for the purpose of preserving the homestead: *Camp v. Grider*, 62 Cal. 20.

A deed absolute intended as a mortgage, executed by a husband and wife upon the wife's separate prop-

erty, which had been declared a homestead, to secure the debt of the husband, can be foreclosed after the death of the husband, although no claim has been presented against the estate, upon which the creditor has waived all demands for the mortgage debt: *Bull v. Coe*, 77 Cal. 54.

Claim Secured by Mortgage: See § 154, *post*.

§ 138. [1476.] Duty of Appraisers.—If the homestead, as selected and recorded, be returned in the inventory appraised at more than five thousand dollars, the appraisers must, before they make their return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceeded five thousand dollars, or if the homestead was appraised as provided in the Civil Code, and such appraised value exceeded that sum, the appraisers must determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must admeasure and set apart to the parties entitled thereto such portion of the premises, including the dwelling-house, as will amount in value to the sum of five thousand dollars, and make report thereof, giving the metes, bounds, and full description of the portion set apart as a homestead. If the appraisers find that the premises exceeded in value, at the time of their selection, the sum of five thousand dollars, and that they cannot be divided without material injury, they must report such finding, and thereafter the court may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto.

Arizona.—Same, except that the words "four thousand" are substituted for "five thousand" twice in the last part of the section. Rev. Stats., sec. 1102.

Idaho.—Same as California. Rev. Stats., sec. 5449.

Montana.—Same as California, except valuation is two thousand five hundred dollars. Comp. Stats., p. 308, sec. 142.

Wyoming. — "If the homestead be returned in the inventory appraised at more than fifteen hundred dollars, the appraisers must, before they make their return, ascertain and appraise the value of the homestead, and if such value exceed fifteen hundred dollars, the appraisers must determine whether the premises can be divided without material injury," etc.; balance of section same as California, except that the valuation is "fifteen hundred dollars." Laws 1890-91, p. 268, sec. 10.

Appraisement: See § 115, *ante*. the court cannot substitute money
Where no homestead has been therefor: *In re Noah*, 73 Cal. 590.
 selected during the life of deceased,

Form No. 91. — Order Appointing Appraisers to Appraise and Admeasure Homestead.

[Title of Court and Estate.]

The petition of —, administrator of the estate of —, deceased (or widow of said —, deceased), praying this court to set aside to the exclusive use of the family of decedent the homestead of said decedent, having been heretofore filed herein, and it appearing from the inventory and appraisement on file herein of the property of said decedent that the realty upon which a declaration of homestead was filed during the life of said decedent is of a greater value than five thousand dollars, and it appearing that it is necessary to appoint appraisers to admeasure and set off to the said family of decedent a portion of said property claimed as a homestead to the said family of decedent as a homestead and appraise the same;—

It is therefore ordered that —, —, and —, three disinterested persons, residents of this county, be and they are hereby appointed such appraisers.

Dated —, 18—. —, Judge of the — Court.

Form No. 92. — Certificate of Appointment and Oath of Office of Appraisers to be Annexed to their Report.

[Title of Court and Estate.]

I — county clerk of the — county of —, and *ex officio* clerk of the — court of said county, do hereby certify that —, —, and — were duly appointed appraisers to admeasure, set off, and appraise a homestead for the family of decedent by the order of the above-named court heretofore made and entered.

Witness my hand and the seal of said superior court this
 — day of —, A. D. 18—. —, Clerk.

State of —, }
 — County of —. } ss.

I do solemnly swear that I will support the constitution of the United States of America, and the constitution of the state of —; that I will faithfully discharge the duties of appraiser to appraise, admeasure, and set off the homestead in the matter of the estate of — deceased, according to law.

Sworn and subscribed to before me this — day of —,
 A. D. 18—. —, Clerk.

By —, Deputy Clerk.

Form No. 93. — Report of Appraisers.

[Title of Court and Estate.]

To the Honorable — Court of the — County of —, State of —.

The undersigned, heretofore duly appointed by this court to appraise, admeasure, and set off out of the property of the estate of —, deceased, a homestead to the family of said decedent, respectfully report that we have performed the duty assigned us, as follows:—

1. That before proceeding to perform the duties required of us we duly qualified as such appraisers;

2. That during the marriage and in the lifetime of decedent a declaration of homestead was duly filed by — in the office of the county recorder of —, state of —, claiming as a homestead for the benefit of the claimant and his (or her) family the following described real estate, which was then and there community property of said — and his (or her) wife (or husband), to wit (here insert description);

3. That the value of said premises was estimated by said claimant and stated in said declaration to be the sum of six thousand dollars, and we find upon investigation that said estimate was correct, and we therefore appraise said real property to have been at that time of the value of six thousand dollars; that in the inventory and appraisement heretofore filed

herein said property is appraised at the sum of seven thousand dollars;

4. That we have viewed the premises and find that a homestead cannot be admeasured and set apart as required by law to the family of decedent out of said realty without material injury to the value thereof (or we have viewed said premises and have set off a portion thereof of the value of five thousand dollars, including the dwelling-house, to the family of decedent, and the portion so set off is described as follows (here insert description)).

Dated —

— } Appraisers.
— }
— }

§ 139. [1477.] Report of the Appraisers. — Any two of the appraisers concurring may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third appraiser. The report must state fully the acts of the appraisers. Both reports may be heard and considered by the court in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed.

Arizona. — Same. Rev. Stats., sec. 1103.

Idaho. — Same. Rev. Stats., sec. 5450.

Montana. — Same. Comp. Stats., p. 308, sec. 143.

Wyoming. — Same. Laws 1890-91, p. 269, sec. 11.

§ 140. [1478.] Hearing Report. — When the report of the appraisers is filed, the court must set a day for hearing any objections thereto, from any one interested in the estate. Notice of the hearing must be given for such time and in such manner as the court may direct. If the court be satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the court may appoint new appraisers to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of their report as upon the first report.

Arizona. — Same. Rev. Stats., sec. 1104.

Idaho. — Same. Rev. Stats., sec. 5451.

Montana. — Same. Comp. Stats., p. 308, sec. 144.

Wyoming. — Same. Laws 1890-91, p. 269, sec. 12.

Sections 1479, 1480, 1481, 1482, 1483, and 1484 of the California Code of Civil Procedure were repealed by act approved March 24, 1874: Amendments 1873-74, p. 364; took effect July 1, 1874.

Form No. 94.—Order Fixing Day for Hearing Report of Appraisers.

[Title of Court and Estate.]

Whereas the report of —, —, and —, the appraisers heretofore appointed to appraise, admeasure, and set off out of the property of the estate of —, deceased, a homestead to the family of said decedent, has been filed;—

It is therefore ordered that —, the — day of —, A. D. 18—, at the hour of ten o'clock, A. M., at the court-room of this court, be and the same is hereby appointed as the time and place for hearing said report, and the clerk of this court is hereby directed to post notices of said hearing in three of the most public places in this county at least ten days before said — day of —, A. D. 18—. —, Judge of the — Court.

Dated —

Form No. 95.—Opposition to Confirmation of Report of Appraisers.

[Title of Court and Estate.]

Now comes — and opposes the confirmation of the report of the appraisers heretofore appointed by this court to appraise, admeasure, and set off a homestead to the family of the above-named decedent, and for cause thereof alleges:—

1. That contestant is a creditor of said estate, and there is due from said estate to him the sum of — dollars, as is shown by his claim, which has been heretofore duly allowed, approved, and filed herein, which is hereby referred to and made a part hereof;

2. That the land mentioned in said appraisers' report, and valued by them at the sum of six thousand dollars at the time of the filing of the declaration of homestead thereon, was of the value of eight thousand dollars at said time;

3. That the portion of said premises set apart by said appraisers as a homestead for the sole use and benefit of the family of decedent is of a value much greater than five thousand dollars, to wit, six thousand dollars;

4. That said homestead cannot be set apart to the family of decedent without material damage and injury to the value of both said homestead and the remaining portion of the tract first above mentioned and to said entire tract; that said subdivisions of said entire tract will be depreciated in value at least one thousand dollars if said segregation and division is made, and in consequence of such depreciation in value there will not be sufficient property in said estate to pay in full the debts due from said estate to contestant and the other creditors of said estate;—

Wherefore contestant prays that said report of said appraisers be rejected, and that said premises may be sold according to law, and the proceeds paid to those entitled thereto.

—, Contestant.

—, Attorney for Contestant.

Form No. 96.—Order Confirming Report of Appraisers.

[Title of Court and Estate.]

The report of the appraisers heretofore appointed herein to appraise, admeasure, and set off a homestead for the sole use and benefit of the family of —, deceased, having been filed herein on the — day of —, A. D. 18—, and an order having been made thereafter on the — day of —, A. D. 18—, by this court, setting the same for hearing this day before this court, and due and legal notice of said hearing having been given by the clerk as directed by said order, and said matter coming on regularly for hearing on this day, upon the said report of said appraisers and the opposition of — filed herein, and it appearing that the facts stated in said report are true,—

It is hereby ordered that said report be and the same is hereby confirmed, and in pursuance of said report the property hereinafter described is hereby set apart to the exclusive use and benefit of —, the widow of said decedent, and —, —, and —, his minor children; said real property is described as follows, to wit (here insert description).

Dated —, 18—.

—, Judge of the — Court.

Form No. 97.—Order Confirming Report of Appraisers and Directing Homestead to be Sold.

[Title of Court and Estate.]

The report of the appraisers heretofore appointed herein to appraise, admeasure, and set off a homestead for the sole use and benefit of the family of —, deceased, having been filed herein on the — day of —, A. D. 18—, and an order having been made thereafter on the — day of —, A. D. 18—, by this court, setting the same for hearing this day before this court, and due and legal notice of said hearing having been given by the clerk as directed by said order, and said matter coming on regularly for hearing on this day, upon the said report of said appraisers, and it appearing that the facts stated therein are true, and that it appears therefrom that the real property upon which the declaration of homestead was filed in the lifetime of decedent cannot be segregated or divided so as to assign a homestead for the sole use and benefit of the family of decedent, as provided by law,—

It is therefore ordered that the realty upon which said declaration of homestead was filed be sold by the administrator of the estate of said decedent at public auction upon the following terms, to wit, cash, gold coin of the United States, ten per cent of the purchase price to be paid at the time of said sale, and the balance upon the confirmation thereof by this court, and that he report his proceedings in that behalf to this court immediately after making said sale; said real estate is described as follows, to wit (here insert description); that before making such sale said administrator file an additional bond, herein in the penal sum of — dollars.

Dated —, 18—. —, Judge of the — Court.

Form No. 98.—Order Rejecting Report of Appraisers.

[Title of Court and Estate.]

The report of the appraisers heretofore appointed herein to appraise, admeasure, and set off a homestead for the sole use and benefit of the family of —, deceased, having been filed herein on the — day of —, A. D. 18—, and an order having been made thereafter on the — day of —, A. D. 18—,

by this court, setting the same for hearing this day before this court, and due and legal notice of said hearing having been given by the clerk as directed by said order, and said matter coming on regularly for hearing on this day upon the said report of said appraisers and the opposition of — filed herein, and it appearing the premises set apart by said appraisers as a homestead for the family of decedent is of a greater value than five thousand dollars,—

It is therefore ordered that said report be and the same is hereby rejected, and it is further ordered that —, —, and —, three disinterested persons, residents of this county, be and they are hereby appointed appraisers to appraise, admeasure, and set off to the exclusive use of the family of decedent out of the realty mentioned in the said rejected report, and upon which the declaration of homestead was filed in the lifetime of decedent.

—, Judge of the — Court.

Dated —, 18—.

§ 141. [1485.] Rights to Homestead — Costs.— The costs of all proceedings in the superior court provided for in this chapter must be paid by the estate as expenses of administration. Persons succeeding by purchase or otherwise to the interests, rights, and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire.

Arizona. — Same. Rev. Stats., sec. 1105.

Idaho. — Same. Rev. Stats., sec. 5452.

Montana. — Same. Comp. Stats., p. 309, sec. 145.

Wyoming. — Same. Laws 1890-91, p. 269, sec. 13.

See secs. 317-321, *post*, also Cal. Code Civ. Proc., secs. 1010 et seq.

Appraisers: See § 97, subd. 3, *ante*.

Cost bill should be filed for cost paid to persons other than officers of court upon an application to set apart a homestead, and should be paid as expenses of administration: *In re Ri-caul*, Myr. Prob. 158.

The right to a homestead in a probate proceeding is not the subject of sale. The quitclaim deed of a widow "of her right, title, and interest in the real estate left by her hus-

band" does not convey her right to a homestead out of such real estate: *In re Moore*, 57 Cal. 437.

The right to a probate homestead is not an estate either in law or equity, and is not the subject of sale: *Bowman v. Norton*, 16 Cal. 215; *Lies v. De Diabler*, 12 Cal. 327.

A bill of sale made by a widow conveying any "interest which she might take as heir at law of her deceased husband" does not convey exempt personal property set apart by the court for the use of the family of deceased: *In re Moore*, 57 Cal. 437.

§ 142. [1486.] Certified Copies to be Recorded.—A certified copy of every final order made in pursuance of this article, by which a report is confirmed, property assigned, or sale confirmed, must be recorded in the office of the recorder of the county where the homestead property is situated.

Arizona.—Same. Rev. Stats., sec. 1106.

Idaho.—Same. Rev. Stats., sec. 5453.

Montana.—Same. Comp. Stats., p. 309, sec. 146.

ARTICLE III.

OF THE HOMESTEADS OF INSANE PERSONS.

§ 143.—An act to enable certain parties therein named to alienate or encumber homesteads. Approved March 25, A. D. 1874.

- § 1. Sale of homestead of insane person.
- § 2. What notice given.
- § 3. Application, when filed.
- § 4. Order of court.
- § 5. Fees of public administrator.

Sale, notice, etc.

“In case of a homestead, if either the husband or wife shall become hopelessly insane, upon application of the husband or wife not insane to the superior court of the county in which said homestead is situated, and upon due proof of such insanity, the court may make an order permitting the husband or wife not insane to sell and convey or mortgage such homestead.” Cal. Stats. 1873-74, p. 582, sec. 1.

What notice given.

“Notice of the application for such order shall be given by publication of the same in a newspaper published in the county in which such homestead is situated, if there be a newspaper published therein, once each week for three successive weeks prior to the hearing of such application, and a copy of such notice shall also be served upon the nearest male relative of such insane husband or wife, resident in this state, at least three weeks prior to such application; and in case there be no such male relative known to the applicant, a copy of such notice shall be served upon the public administrator of the county in which such homestead is situated, and it is hereby made the

duty of such public administrator, upon being served with a copy of such notice, to appear in court and see that such application is made in good faith, and that the proceedings thereon are fairly conducted." Cal. Stats. 1873-74, p. 582, sec. 2.

Application, when filed.

"Thirty days before the hearing of any application under the provisions of this act, the applicant shall present and file, in the court in which such application is to be heard, a petition for the order mentioned in the first section of this act, subscribed and sworn to by the applicant, setting forth the name and age of the insane husband or wife; the number, age, and sex of the children of such insane husband or wife; a description of the premises constituting the homestead; the value of the same; the county in which it is situated; and such facts, in addition to that of the insanity of the husband or wife, relating to the circumstances and necessities of the applicant and his or her family, as he or she may rely upon in support of the petition." Cal. Stats. 1873-74, p. 582, sec. 3.

Order of court.

"If the court shall make the order provided for in the first section of this act, the same shall be entered upon the minutes of the court, and thereafter any sale, conveyance, or mortgage made in pursuance of such order shall be as valid and effectual as if the property affected thereby was the absolute property of the person making such sale, conveyance, or mortgage in fee-simple." Cal. Stats. 1873-74, p. 582, sec. 4.

Fees of public administrator.

"For all services rendered by any public administrator under the provisions of this act, he shall be allowed a fee not exceeding twenty dollars, to be fixed by the court, and the same shall be taxed as costs against the person making application for the order herein provided for." Cal. Stats. 1873-74, p. 582, sec. 5.

Laws repealed.

"All acts and parts of acts in conflict with the provisions of this act are hereby repealed." Cal. Stats. 1873-74, p. 582, sec. 6.

Effect.

"This act shall take effect and be in force from and after its passage." Cal. Stats. 1873-74, p. 582, sec. 7.

Nevada. — “If the wife of any owner of a homestead shall be insane, and such owner shall desire to convey such homestead, or any interest therein, he may petition the district court [of the district] in which such homestead may be situated for license to convey the same, and such court, upon reasonable and not less than twenty days’ notice of such petition to the kindred of such insane wife, residing in this state (which notice may be personal or by publication in some newspaper in the county, or [as] directed by the court), may hear and determine such petition, and may license such owner to convey such homestead, or any interest therein, by his sole deed; which license shall be recorded in the office where such homestead is recorded, and thereupon such sole deed shall have the same operation as if such wife had been sane and joined in such deed.” Gen. Stats., sec. 543.

“On granting such license, such court may make such special order as to the investment or disposition of the funds derived from conveyance as a court of chancery could do in the case of the funds of married women.” Gen. Stats., sec. 544.

“On the hearing of such petition for license, any of such kindred may appear and be heard in the premises, and may appeal from any order made on the subject in the same manner provided for other appeals from decrees of the district court.” Gen. Stats., sec. 545.

Form No. 99. — Petition for Order to Sell and Convey (or Mortgage) Homestead of Insane Person.

(Stats. 1873-74, pp. 582, 583.)

In the Matter of the Application to Sell, etc., Homestead of
—, an Insane Person.

To the Honorable — Court of the — County of —, State
of —;

The petition of — respectfully shows: —

That — and petitioner are, and for a long time past have
been, husband and wife;

That said — is of the age of — years, and has been a
resident of the — county of —, state of —, for more than
— years last past;

That there are now living the following named male children
of petitioner, and said —, to wit, —, aged — years, a
resident of the — county of —, state of —, etc.;

That on or about the — day of —, A. D. 18—, said —
became and ever since has been and now is hopelessly insane,
and was duly committed on the — day of —, A. D. 18—,
to the insane asylum at —, and is now in said asylum;

That said — and petitioner are the owners of certain real

estate which is community property, and which is described as follows, to wit (here insert description);

That the actual cash value of said real estate is the sum of \$—;

That a declaration was duly made, claiming said premises as a homestead, and was duly acknowledged, filed for record, and recorded in the office of the county recorder of the — county of —, state of —, on the — day of —, A. D. 18—, and was duly recorded in Book No. — of Homesteads, on page;—

(Here state such facts relating to the circumstances and necessities of petitioner and his or her family, as he or she may rely upon in support of this petition);—

Wherefore petitioner prays for an order of this court authorizing petitioner to sell and convey (or mortgage) the said premises pursuant to the law in such case made and provided.

—, Petitioner.

—, Attorney for Petitioner.

State of —,
— County of —. } ss.

—, the petitioner above named, being duly sworn, deposes and says that he has heard read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters, he believes it to be true.

Subscribed and sworn to before me this — day of —, A. D. 18—. —, Notary Public.

Form No. 100.—Notice of Application to Sell and Convey (or Mortgage) Homestead of Insane Person.

[Title of Court and Matter as in Form No. 99.]

Notice is hereby given that I, —, wife of —, have applied to the — court of the — county of —, state of —, for an order authorizing me to sell and convey (or mortgage) the homestead of said — and myself, upon the ground that said — is hopelessly insane, and because said sale (mortgage) has become necessary, for reasons which are more fully stated in my petition therefor on file in said court, and that the hear-

ing of said application and petition will be had on the — day of —, 18—, at the hour of — o'clock, — M., of said day. Said homestead is described as follows, to wit (here insert description). —, Applicant.

Dated —, 18—.

Form No. 101.—Order Authorizing Sale and Conveyance (or Mortgage) of Homestead of Insane Person.

[Title of Court and Matter as in Form No. 99.]

This matter coming on regularly for hearing upon the petition of — to sell and convey (or mortgage) certain real estate which has been dedicated as a homestead, and it appearing to the court that due and legal notice was given of this application, and it appearing that said petition was filed in this court on the — day of —, A. D. 18—, and that all the allegations therein contained are true, and that petitioner is entitled to the relief prayed for therein, —

It is ordered, adjudged, and decreed that the petitioner, —, be and she is hereby authorized and empowered to sell and convey (mortgage) in her own name the homestead of herself and husband which is described in said petition as follows, to wit (here insert description), and she is further authorized and empowered to make, execute, and deliver proper conveyances therefor to the purchaser thereof.

Dated —, 18—.

—, Judge of the — Court.

Form No. 102.—Conveyance of Homestead of Insane Person.

This indenture, made the — day of —, A. D. 18—, between —, wife of —, of the county of —, state of —, the party of the first part, and —, of the county of —, in said state, the party of the second part, witnesseth, that whereas, —, the said husband of the said party of the first part, is hopelessly insane; that the real estate hereinafter described has been dedicated as and is the homestead of the said party of the first part and her said husband; that it is to the best interest of the said party of the first part and her said husband that their said homestead should be sold; and whereas such pro-

ceedings were had in the matter of said homestead that the — court of the county of —, state of —, after the filing of a proper petition therefor, and after due and legal notice of the hearing of such petition, on the — day of —, A. D. 18—, made and entered an order authorizing the said party of the first part to sell and convey said real estate in her own name, which said order is hereby referred to and made a part hereof; that under and by virtue of said order said party of the first part has sold said real estate, and the party of the second part has become the purchaser thereof;—

Now, therefore, the said party of the first part, pursuant to said order, and in consideration of the sum of — dollars to — in hand paid, receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents does hereby grant, bargain, sell, and convey, unto the said party of the second part, his heirs and assigns forever, all that certain lot, piece, or parcel of land situate in the county of —, state of —, which is particularly described as follows, to wit (description);—

Together with all the tenements, hereditaments, and appurtenances whatsoever to the same belonging or in any wise appertaining;

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set her hand and seal, the day and year first above written.

Signed, sealed, and delivered in the presence of —.

— [SEAL]

Form Not 103.— Mortgage of Homestead of Insane Person.

This indenture, made on the — day of —, A. D. 18—, between —, wife of —, of the county of —, state of —, the party of the first part, and —, of the county of —, in said state, the party of the second part, witnesseth, that whereas —, the said husband of the said party of the first part, is hopelessly insane; that the real estate hereinafter

described has been dedicated as and is the homestead of the said party of the first part and her said husband; that it is to the best interest of the said party of the first part and her said husband that their said homestead should be mortgaged; and whereas such proceedings were had in the matter of said homestead that the — court of the — county —, state of —, after the filing of a proper petition therefor, and after due and legal notice of the hearing of such petition, on the — day of —, A. D. 18—, made and entered an order authorizing the said party of the first part to mortgage said real estate in her own name, which said order is hereby referred to and made a part hereof; that under and by virtue of said order said party of the first part, as mortgagor, mortgages to the party of the second part, as mortgagee, all that real property situated in the — county of —, state of —, and known, designated, and described as (description), together with all the improvements thereon, and the hereditaments and appurtenances thereunto belonging, as security for the payment to said mortgagee of a certain promissory note, in the words and figures following:—

\$—. SACRAMENTO, CALIFORNIA, —, 18—.

— after date, for value received, — promise to pay —, or order, — dollars, in gold coin of the present standard of value, with interest thereon from date until paid, at the rate of — per cent per —, in like coin, payable —, and if not so paid, the interest may be added to the principal and bear like interest, and the whole note may, at the option of the holder, without notice to the maker thereof, be treated as due and collectible, both principal and interest to be paid at —; and also to secure all other indebtedness that may hereafter, during the continuance of this mortgage, be due, owing, or existing from said mortgagor, —, to said mortgagee, not exceeding — dollars.

And it is hereby further agreed that the mortgagor shall and will keep the improvements upon the mortgaged premises insured for —, and will have such insurance made payable to the mortgagee, as additional security for the payment of the note aforesaid; and in default of keeping said improvements insured as aforesaid, then said mortgagee may cause the same

to be insured at the expense of the said mortgagor; and that the mortgagor will, on demand, repay to the mortgagee, in gold coin, all moneys paid by the mortgagee to obtain said insurance, and also all sums paid by the mortgagee to discharge any tax or assessment on said premises, or the improvements thereon, not chargeable against the mortgagee under the constitution and laws of said state, which payments the mortgagee is hereby authorized to make, and that this mortgage shall stand as security for the repayment to the mortgagee of all sums which he shall have paid for the purposes aforesaid, together with interest thereon from the date of the payment thereof, at the rate of ten per cent per annum, until repayment is made to the mortgagee; and in case it shall become necessary to defend or intervene to protect the title to said property, or the right to the possession thereof, or the right or lien of this mortgage, in any action of ejectment, suit for partition, or to foreclose a lien, or any other legal proceeding whatsoever, the said mortgagee or his assigns may take charge and control of such intervention or defense, and this mortgage shall stand as security for the repayment of all moneys expended in such defense or intervention, for counsel fees or otherwise, together with interest thereon at the rate of ten per cent per annum.

And in case default be made in the payment of said note, or of any installment thereof, or of any interest due thereon, then the mortgagee may, at his option, and without notice to the mortgagor, at once proceed to foreclose this mortgage, and in any such proceeding to foreclose he shall be allowed a reasonable and just sum, to be fixed by the court, with which to pay the attorney's and counsel fees in such foreclosure proceedings, in gold coin, which sum shall be secured by this mortgage, and shall become due upon the filing of the complaint; and on the filing of such complaint in such foreclosure proceeding, or at any time thereafter, the court shall, if requested by the plaintiff, name some disinterested person as receiver, and shall authorize such receiver to at once take possession of the mortgaged premises, and collect the rents and profits thereof, and apply them to the satisfaction of such judgment, and to sell said premises in the same manner as lands are sold upon execution, and to continue in the use and possession of said premises,

and to collect the rents and profits thereof until the premises are redeemed from such sale, or until title is vested in the purchaser by the execution of a conveyance in pursuance of the sale.

In witness whereof, the said mortgagor has hereto set her hand and seal the day and year first herein written.

— [SEAL]

ARTICLE IV.

OF DOWER.

§ 143 a. **Assignment of Dower.** — “When a widow is entitled to dower in the lands of which her husband died seised, and her right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them, it may be assigned to her in whatever counties the lands may lie, by the county court of the county in which the estate of the husband is settled, upon application of the widow or any other person interested in the lands; notice of which application shall be given to such heirs, devisees, or other persons, in such manner as the county court shall direct.” Hill’s Laws of Oregon, sec. 2961.

“For the purpose of assigning such dower, the county court shall direct a warrant to issue to three discreet and disinterested persons, authorizing and requiring them to set off the dower by metes and bounds, when it can be done without injury to the whole estate.” Hill’s Laws of Oregon, sec. 2962.

“The commissioners shall be sworn by a judge of any court of record or a justice of the peace faithfully to discharge their duties, and shall, as soon as may be, set off the dower according to the command of such warrant, and make return of their doings, with an account of their charges and expenses, in writing, to the county court; and the same being accepted and recorded, and an attested copy thereof filed in the office of the county clerk of the county where the lands are situated, the dower shall remain fixed and certain, unless such confirmation be set aside or reversed; costs on appeal, and one half of the costs of such proceedings, shall be paid by the widow, and the other half by the adverse party.” Hill’s Laws of Oregon, sec. 2963.

Washington. — Dower abolished. Gen. Stats., 1405.

The court of probate can protect dower interest of widow in money in the hands of the administrator of the estate of her deceased husband: *Butler v. Smith*, 20 Or. 126.

Form No. 104. — Petition for Admeasurement of Dower.

[Title of Court and Estate.]

The petition of — respectfully shows unto the court:—

1. That she is the widow of —, deceased, whose estate is now in course of administration in this court, and that her said husband died on the — day of —, A. D. 18—;

2. That at the time of his death, and during the time that he was the husband of petitioner, he was seised in fee of and owned the following described real property, to wit (description);

3. That she has not had her dower therein assigned to her, but is now entitled thereto;—

Wherefore she prays this honorable court for an admeasurement of her dower in said real estate, and that said dower be assigned to her.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 105. — Order of Notice of Petition for Admeasurement of Dower.

[Title of Court and Estate.]

The petition of —, widow of —, deceased, praying for the assignment of dower to her out of certain real estate of said deceased, having been filed herein, it is ordered that the same be set for hearing before this court on the — day of —, A. D. 18—, at the court-room of this court in the above-named county, at the hour of ten o'clock, A. M., of said day.

It is further ordered that notice thereof be given by the clerk of this court by posting said notice in three public places in this county, and that a copy of such notice be mailed by the clerk of this court to each of the heirs at law (legatees) of said deceased, addressed to him at the county seat of this county, postage prepaid (or that said notice be served by publication in the —, a newspaper published in this county, for at least ten days prior to the hearing of said petition.)

—, County Judge.

Dated —, 18—.

Form No. 106.—Order for the Appointment of Guardian.

[Title of Court and Estate.]

Now, on this — day of —, A. D. 18—, —, the widow of —, deceased, appeared in court, and alleged that she is about to make application to this court for the admeasurement of her dower, of certain lands and tenements, situated in said county, as the widow of said deceased, and that — and — are heirs of the said deceased (or are owners of such lands and tenements), and are minors, and prayed that guardians may be appointed for them. It is therefore ordered that — be appointed guardian for the said minors for the sole purpose of appearing for and taking care of the interests of said minors in the premises. —, Judge of the — Court.

Dated this — day of —, A. D. 18—.

Form 107.—The Appointment of Guardian.

[Title of Court and Estate.]

To —, Esq., of the County of —, Greeting.

Whereas —, widow of —, deceased, has this day appeared before the — court of the county of —, state of —, and alleged that she is about to make application to said court for the admeasurement of her dower of certain land and tenements, situate in the town of —, in the county of —, in said state, as the widow of said deceased, and that — and — are heirs of said deceased (or are owners of the said lands and tenements), and are minors, and prayed that guardians might be appointed by said court for them, and an order for that purpose having been heretofore made herein by this court, you, the said —, are hereby appointed guardian of the said — and —, minors as aforesaid, for the sole purpose of appearing for and taking care of the interests of said minors in the premises.

In witness whereof, we have hereunto subscribed our name, and have attached the seal of said court hereto, this — day of —, A. D. 18—.

[SEAL]

—, Clerk of said — Court.

Form No. 108. — Notice of Petition for Admeasurement of Dower.

[Title of Court and Estate.]

To —, heirs at law (or as the case may be), legatees of said deceased, and all persons claiming under them.

You are hereby notified that —, the widow of —, deceased, has filed in the above-entitled court, wherein the estate of said deceased is being administered, her petition praying that an admeasurement of her dower be had, and that said dower be assigned to her out of the following described real property of said deceased, to wit (description).

You are further notified that the hearing of said petition has been set for Monday, the twenty-first day of January, A. D. 1889, at the hour of ten o'clock, A. M., of said day, at the courtroom of said court, at the county court-house of the above-named county, at which time and place you will show cause, if any there be, why said petition should not be granted.

[SEAL]

—, Clerk.

Form No. 109. — Order for Admeasurement of Dower.

[Title of Court and Estate.]

Now, on this — day of —, A. D. 18—, the petition of — coming on to be heard, praying that an assignment be made to her of her dower, and it appearing that — is the widow of —, deceased; that his estate is being administered in this court; that during his lifetime, and while he was the husband of petitioner, said deceased was seised in fee and was the owner of the land hereinafter described; that petitioner is entitled to dower out of said real estate; that due notice of the hearing of said petition has been given to the heirs at law (devisees) of said deceased, and all persons claiming under them, as required by law and the order of this court heretofore made herein; and no reason appearing why said petition should not be granted,—

It is ordered that a warrant be issued by the clerk of this court to —, —, and —, who are discreet and disinterested persons, authorizing and requiring them to set off to said —,

widow of said —, deceased, her dower in the following described real estate, by metes and bounds, if it can be done without injury to the whole estate; said real estate is described as follows, to wit (description); that after having set off said dower to said —, as above directed, that they make a report, in writing, of their doings to this court, and file therewith a statement of their expenses and disbursements herein.

—, Judge of — Court.

Form No. 110.—Warrant for Admeasurement of Dower.

The People of the State of — send Greeting to —, —, and —.

Whereas —, widow of —, deceased, has presented to the county court of the county of —, state of —, praying for an assignment of her dower out of the real property of deceased, which is described as follows (description);

And whereas said court has ordered that her said dower in said real estate be set apart and assigned to her as the law provides, and has appointed you and each of you commissioners to admeasure such dower;—

You are therefore authorized and empowered by this warrant to admeasure, lay off, and assign to —, widow of said —, deceased, her dower in said premises, to wit, a portion thereof equal to an undivided one-third interest therein, as speedily as may be, and thereafter to make a written report of your doings in that behalf, and also a report of your disbursements and expenses incurred in the execution of this warrant.

—, Clerk of the — Court.

Form No. 111.—Oath of Commissioners.

[Title of Court and Estate.]

State of —, }
— County of —. } ss.

—, —, and —, commissioners appointed to admeasure the dower of —, widow of —, deceased, being first duly sworn, each, on oath, deposes and says that he will faithfully discharge his duty as commissioner to admeasure and assign

dower out of the real property of —, deceased, to —, his widow.

Subscribed and sworn to before me this — day of —
A. D. 18—. — (title of officer).

Form No. 112.—Report of Commissioners to Admeasure and Assign Dower

[Title of Court and Estate.]

We, the undersigned, heretofore appointed commissioners to admeasure and set apart to —, widow of —, deceased, her dower in the real estate of said deceased, respectfully report that we have performed our duties as directed by the annexed warrant, as follows: After receiving said warrant we each took the oath prescribed by law to be taken by us, which said oath is hereto attached; we then proceeded to view the land described in said warrant as the property of said —, deceased; finding it necessary, we employed —, Esq., a competent surveyor and his necessary assistants to aid us in the admeasurement, and we have assigned to said widow, as her dower, the following described portion of said real estate, to wit (description).

Our expenses and disbursements have been as follows:—
Three days' services of ourselves, at \$5 per day each . . . \$45 00
Three days' services of said surveyor and his assistants,
at \$20 per day 60 00
Total \$105 00

Respectfully submitted, etc.,

— }
— } Commissioners
— } as aforesaid.

Dated —, A. D. 18—.

Form No. 113.—Order Confirming Report of Commissioners.

[Title of Court and Cause.]

Whereas, —, —, and —, commissioners appointed pursuant to the former order of this court on the petition of —, the

widow of —, deceased, situate in the county of —, in this state, whereof the said — died seised of an estate of inheritance, have this day made report to this court, among other things, that after having been sworn before legal authority faithfully, honestly, and impartially to discharge the duty and execute the trust reposed in them by the said appointment, they did, on the — day of —, A. D. 18—, in the presence of the said —, widow as aforesaid (or of —, her lawful attorney), and also in the presence of said — and —, heirs as aforesaid (or —, their lawful attorney), cause a survey to be made of the lands and premises in the said petition, appointment, and report mentioned, as will fully appear therefrom, reference being had thereto, and caused a map thereof to be made, and that they had admeasured and allotted to the said —, widow, as aforesaid, of said —, deceased, for her dower, a portion of said lands equal to an undivided one-third part of the said lands and premises, which part so admeasured and allotted will fully appear by said report this day filed in this court, and entered at large on the minutes thereof; and whereas said —, at said time and place first aforesaid, appeared before this court and prayed that said report be confirmed, and no cause appearing to the contrary, it is ordered that the said report and admeasurement be and the same are hereby confirmed. (If the report be contested, enter the order as follows: And whereas, on the day and at the place first aforesaid, the said — and —, by their respective attorneys (or counsel), and after hearing the proofs and allegations of said parties, it is ordered.) —, Judge of — Court.

Montana. — “Whenever the wife of any person shall have become insane, imbecile, or idiotic, or from any cause shall be unable from defective intellect to join her husband in the conveyance of real estate, and shall have remained in that condition for more than two years, or when it shall be made to appear to the court or judge that such married woman is incurably insane, she may be barred of her right of dower in the lands of her husband, in the manner following, to wit.” Laws 1889, p. 121, sec. 1.

“The husband, or any person interested in such real estate, may apply to the district court, or judge, of the county where such lands, or part of such lands, are situated, by petition, under oath, for the appointment of a guardian, and for leave to sell her inchoate right of dower, which petition shall state, — 1. The name, age, and residence of such married woman, and the name, residence, and age of her husband, as near as can be ascertained; 2. The

nature of the disability of such married woman, and the length of time it has existed; 3. A full description of the lands and premises in this territory to be affected by such proceedings; 4. The value of each piece of real estate, and the amount of encumbrance upon it, if any, not affected by or prior to her claim of dower; 5. If the real estate is to be sold by the husband, or has been sold by him, the exact amount of the consideration of such sale as made or agreed upon; 6. The reasons why such sale is desirable to said husband or petitioner." Laws 1889, p. 121, sec. 2.

"Upon the filing of such petition, the said district judge or court shall enter an order that the petition be heard on a certain day, and notice of the hearing be given by publication or otherwise, in such manner and to such person as said judge or court shall direct." Laws 1889, p. 122, sec. 3.

"At such hearing the said wife may appear by counsel, or by guardian *ad litem* appointed as in other cases by said court or judge, and may answer such petition in the time and manner said court or judge may direct, and upon the filing of an answer the case shall be deemed at issue, or if the said wife shall fail to appear as herein provided, the judge or court shall appoint some competent attorney on behalf of such wife, and proceed summarily upon written evidence taken under its orders to hear and determine the case, or, at its discretion, may refer it to a court commissioner, appointed by the court or judge for the purpose, to take proofs and report the same to the court or judge with his opinion, — 1. As to the insanity or imbecility of the respondent; 2. As to the propriety or necessity of selling said real estate or of barring said respondent's right of dower therein; 3. The cash value, at the time, of her dower interest in said premises, taking into consideration the respective ages of said husband and wife. Upon the coming in of said report the court or judge shall consider the same and enter such order as shall be just and equitable." Laws 1889, p. 121, sec. 3.

"If said court or judge shall decide that the respondent is insane, and that it is desired that the right of dower should be barred, it shall fix the then present value of such dower, and thereafter shall appoint a guardian of such insane person, who shall be some person other than her husband, who shall give a bond in a sum to be fixed by the court or judge, with surety or sureties to be approved by the court, conditioned to receive and invest any money that may come into his hands for her sole use and benefit, under the order and direction of the court or judge, both as to its investment and to the disposition of the income thereof." Laws 1889, p. 122, sec. 4.

"Upon the approval of such bond, said guardian may proceed and sell, at private sale, as such guardian, the interest of such married woman in said land, at a sum not less than the value of said dower as fixed by said court. He may join with the husband in such conveyance; or if the husband has previously sold and conveyed said property, may, by separate conveyances, deed said right of dower to the husband's grantee or grantees, his or their heirs and assigns, but to no other person. Said conveyance shall, in such cases, be as effective to bar the right of dower of said married women as if she had, being of sound mind, joined her husband in a deed of said premises." Laws 1889, p. 123, sec. 5.

"Said guardian shall apply the income of said money to the support of said married woman, or allow the same to accumulate, as the court may direct; and upon the restoration of said married woman to sound mind, shall, upon the order of the court, transfer to her all the funds in his hands, and upon her death shall deliver the same to her husband, if he shall be living at her death; if not living, then to her heirs at law; or in case such wife have no heirs at law, then to the heirs at law of her husband." Laws 1889, p. 123, sec. 6.

"All acts and parts of acts in conflict with the provisions of this act are hereby repealed." Laws 1889, p. 123, sec. 7.

Form No. 114.—Petition by Purchaser to Bar Dower Rights of Insane Wife.

[Title of Court and Estate.]

The petition of — respectfully shows to this honorable court as follows: —

1. That — is the husband of —, who is hereinafter mentioned; that he, said husband, resides at —, in the county of —, state of Montana; that his name is —, as above set forth; that his age is — years; that the name of his said wife is —, as above set forth, her age is — years, and she resides at —, in the county of —, state of Montana;

2. That said —, the said wife of —, is insane (or as the case may be, idiotic, etc.); that her said insanity is incurable;¹ that she became so insane (or idiotic, etc.) on or about the — day of —, A. D. 18—, and thence hitherto she has continuously remained insane (or idiotic, etc.),² and is now incurably insane,³ as aforesaid (or state the facts according to the circumstances);

3. That said — is the owner in fee of all that real estate situate, lying, and being in the county of —, state of Montana, which is particularly described as follows (here insert full description of the lands to be affected by the proceedings, and each parcel thereof;

4. That the value of said real estate is \$— (if there is more than one parcel, state separately the value of each parcel; and if there is any encumbrance prior to or not affected by the wife's claim of dower, state the nature and extent thereof fully);

¹ In case the insanity is curable, this clause may be omitted.

² If not incurable, omit the words between these figures 2.

5. That said — has contracted with petitioner to sell said land to him, and petitioner desires to purchase the same, provided he can procure a perfect title thereto free from encumbrances;

6. That the reasons why such sale is desirable is (here state fully the reasons, etc.);

7. That the exact amount of the purchase price for said real estate, as agreed upon between said — and petitioner, is \$—;

8. That said —, the husband of said —, cannot convey to petitioner a perfect title to said premises free from encumbrances, because said real estate is subject to the claim of dower of said —, the wife of said —, therein;

9. That by reason of her insanity (or imbecility, etc.), as aforesaid, she is not able to join her said husband in the conveyance of said real estate;

10. That it is necessary that a guardian should be appointed for the said —, the wife of said —, to the end that such guardian may join with said —, husband of said —, in conveying said real property;—

Wherefore petitioner prays that this honorable court will appoint some suitable person, after due and legal notice given as guardian of the estate of said —, wife of said —, and that said guardian be empowered and directed to sell her said right of dower, according to law.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 115. — Petition by Husband to Bar Dower of Insane Wife.

[Title of Court and Cause.]

The petition of — respectfully shows to this honorable court as follows:—

1. That he is the husband of —, who is hereinafter mentioned; that he resides at —, in the county of —, state of Montana; that his name is as above set forth, —; that he is — years of age; that the name of his said wife is as above set forth, —; that her age is — years, and her residence is at —, in the county of —, in said state;

2. That the said wife of petitioner is insane (or idiotic, etc.); that her said insanity is incurable;¹ that she became so insane (or idiotic, etc.) on or about the — day of —, A. D. 18 —, and thence hitherto she has continuously remained insane (or idiotic, etc.),² and is now incurably insane;²

3. That petitioner is the owner in fee of all that real estate situate, lying, and being in the county of —, state of Montana, which is particularly described as follows (here insert full description of the lands to be affected by the proceedings, and each parcel thereof);

4. That the value of said real estate is \$ — (if there is more than one parcel, state separately the value of each, and if there is any encumbrance prior to or not affected by the wife's claim of dower, state the nature and extent thereof fully);

5. That petitioner has contracted to sell said real estate to one —, who desires to purchase the same, provided he can procure a perfect title thereto free from encumbrances;

6. That the reasons why such sale is desirable is as follows (here insert reasons fully);

7. That the exact amount of the purchase price for said real estate, as agreed upon between said petitioner and said —, is \$ —;

8. That petitioner cannot convey to said — a perfect title to said real estate free from encumbrances, because it is subject to the right of dower of petitioner's said wife;

9. That by reason of her insanity, as aforesaid, the said wife of petitioner is unable to join him in the conveyance of said real estate;

10. That it is necessary that a guardian should be appointed for the said wife of petitioner, to the end that such guardian may join with petitioner in conveying said real estate; —

Wherefore petitioner prays that this honorable court will appoint some suitable person as guardian of the estate of the said wife of petitioner, and that said guardian be empowered

¹ If insanity is curable, omit this clause.

² If insanity is curable, omit words between these figures 2.

and directed to sell the said right of dower of the said wife of petitioner according to law. —, Petitioner.

—, Attorney for Petitioner.

NOTE. — The above petition must be verified by the oath of petitioner. For form of verification, see Form No. 55, § 80, *ante*.

Form No. 116.—Order Setting Petition for Hearing, etc.

[Title of Court and Estate.]

The verified petition of — having been filed in the above-entitled cause in this court on the — day of —, A. D. 18—, and it appearing therefrom that (if petitioner is the husband of the insane woman, follow subdivisions 1 to 10, inclusive, of Form No. 115, *supra*; but if the petitioner is not the husband of such insane wife, follow subdivisions 1 to 10, inclusive, in Form No. 114, *supra*), —

It is therefore ordered that said matter be heard by this court at the court-room thereof on the — day of —, A. D. 18—, at the hour of — o'clock, — M., of said day, and that notice of said hearing be given by citation to the following named persons, to wit, —;

That such notice and citation be served upon each of said persons personally at least — days before the day of such hearing;

That said notice and citation be served upon said persons by publishing the same for at least — days successively prior to said day of hearing in the Daily Evening Bugle, a newspaper of general circulation printed in this county.

—, District Judge.

CHAPTER VI.
OF CLAIMS AGAINST THE ESTATE.

- § 144. Notice to creditors.
- § 145. Time expressed in the notice.
- § 146. Proof of notice and order made.
- § 147. Time within which claims presented.
- § 148. Claims allowed to bear interest as judgments.
- § 149. Judge may present claim.
- § 150. Allowance and rejection of claims.
- § 151. Approved claims to be filed — Claims secured by liens — Lost claims.
- § 152. Rejected claims.
- § 153. Claims barred by statute of limitations.
- § 154. Claims must be presented before suit.
- § 155. Limitation.
- § 156. Claims in action pending at time of decease.
- § 157. Allowance of claim in part.
- § 158. Effect of judgment against executor.
- § 159. Execution.
- § 160. What judgment is not a lien.
- § 161. Doubtful claims.
- § 162. Trial by referee.
- § 163. Liability of executor.
- § 164. Claims of executor.
- § 165. Executor neglecting to give notice to creditors.
- § 166. Executor to return statement of claims.
- § 167. Interest-bearing claims.

§ 144. [1490.] **Notice to Creditors.**—Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice. Such notice must be published as often as the judge or court shall direct, but not less than once a week for four weeks. The court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor

must give notice only for the unexpired time allowed for such presentation.

Publication of Notice: See § 451, *post*.

Arizona. — Same. Rev. Stats., sec. 1107.

Idaho. — Same; with the following added: "Provided, that when no newspaper is published in the county, the notice shall be posted in not less than three public places in the county, one of which shall be at the court-house door, for such time, not less than four weeks, as the court may order." Rev. Stats., sec. 5460.

Montana. — Same as California. Comp. Stats., p. 310, sec. 147.

Nevada. — "Every executor or administrator shall, immediately after his appointment, cause to be published in some newspaper published in the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the deceased, requiring all persons having claims against the deceased to exhibit them, with the necessary vouchers, within four months after the first publication of the notice, to such executor or administrator, at the place of his residence or transaction of business, to be specified in the notice. Such notice shall be published as often as a judge or court shall direct, but not less than once a week for four weeks. The court or judge may also direct additional notice by publication or posting. In case such executor or administrator resign, or be removed before the expiration of four months after the first publication of such notice, his successor shall give such notice only for the unexpired portion of the four months. After the notice shall have been given as required by the preceding section, a copy thereof, with the affidavit or affidavits of due application (publication), or of the publication and posting, may be filed, and upon such affidavit or affidavits, or upon other testimony to the satisfaction of the court, a decree shall be made showing that due and legal notice to the creditors has been given, and directing that such decree be entered in the minutes of the court." Stats. 1891, p. 105, sec. 2; amending Gen. Stats., sec. 2797.

Oregon. — "Every executor or administrator shall, immediately after his appointment, publish a notice thereof, in some newspaper published in the county, if there be one, or otherwise in such paper as may be designated by the court, or judge thereof, as often as once a week, for four successive weeks, and oftener if the court or judge shall so direct. Such notice shall require all persons having claims against the estate to present them, with the proper vouchers, within six months from the date of such notice, to the executor or the administrator, at a place within the county therein specified." Hill's Laws, sec. 1131.

Utah. — Same as California. Comp. Laws, sec. 4120.

Washington. — Same as first two sentences of California section. Code Proc., sec. 977.

"In case of resignation or removal, for any cause, of any executor or administrator, and the appointment of another or others, after notice has been given by publication as required by law, by such executor or administrator first appointed, to persons to present their claims against the estate, it shall be the

duty of the judge of the court to cause notice of such resignation or removal and such new appointment to be published two successive weeks in the same newspaper in which the original notice was published, if the publication of such paper is at the time continued, and if not, then in some other newspaper published in the county, or if there be no newspaper published in such county, then in a newspaper published in the state and of general circulation in the county, and the estate shall be closed up and settled within the year from the date of said original notice, unless further time be granted by the court as provided by law." Code Proc., sec. 997.

Wyoming. — "Within thirty days after letters are granted, the executor or administrator shall publish in some newspaper in the county, and if there be no newspaper published in the county, within some newspaper of general circulation in the state, and publish therein for three weeks a notice that letters testamentary or of administration have been granted to him, stating the date, and requiring all persons having claims against the estate to exhibit them for allowance to the executor or administrator within six months after the date of the letters, or they may be precluded from any benefit from such estate, and that if such claims be not exhibited within one year from the date of the said letters, they shall be forever debarred. Whenever there is more than one executor or administrator, the notice published and signed by one of them shall be sufficient." Laws 1890-91, pp. 269, 270, sec. 1.

A notice to the creditors of a decedent requiring them to present their claims to the administrator may designate the office of his attorney as the place where he transacts the business of the estate, and the place for the presentation, although he does not reside there, and transacts his ordinary business elsewhere: *Bollinger v. Manning*, 79 Cal. 7.

A publication of notice to cred-

itors of the estate of a deceased person, made in advance of an order of the court fixing the legal period of publication, is invalid; and where the number of publications after the order is made fall below the statutory minimum, the presentation and allowance of a claim more than four months after the last publication are within the time prescribed by law: *Wise v. Williams*, 88 Cal. 30.

Form No. 117. — Order Directing Notice to Creditors.

[Title of Court and Estate.]

It is ordered that notice to creditors in the above-entitled estate be published once each week for four successive weeks in the —, a newspaper of general circulation published in this county. —, Judge of the — Court.

Dated —, 18—.

Form No. 118. — Notice to Creditors.

Estate of —, deceased.

Notice is hereby given by the undersigned, —, administrator (or executor) of the estate of —, deceased, to the credi-

tors of, and all persons having claims against, said deceased, to exhibit them, with the necessary vouchers, within — months after the first publication of this notice, to said administrator at his office (or residence) No. 602 K Street, Sacramento, California, the same being the place for the transaction of the business of said estate in the county of Sacramento, California.

Dated —, 18—. —, Administrator (or Executor).

—, Attorney for Administrator (or Executor).

§ 145. [1491.] Time Expressed in the Notice.—The time expressed in the notice must be ten months after its first publication, when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not.

Arizona. — Same, except valuation of estate is three thousand dollars for a four months' notice. Rev. Stats., sec. 1108.

Idaho. — Same as California, except valuation is fifteen hundred dollars for a four months' notice. Rev. Stats., sec. 5461.

Montana. — Same as California. Comp. Stats., p. 310, sec. 148.

Nevada. — See Gen. Stats., sec. 2797, under preceding section.

Oregon. — Six months' notice is always required. Hill's Laws, sec. 1131, under last section.

Utah. — Same as California, except that "three thousand" is substituted for "ten thousand." Comp. Laws, sec. 4121.

Washington. — Same as California, except that one year's notice is always required. Code Proc., sec. 979. See § 147, *post*.

Value in inventory and appraisal. — properly given: *In re Loeven*, Myr. 203.
if the notice to creditors has been

§ 146. [1492.] Proof of Notice and Order Made.—After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication, or of publication and posting, must be filed, and upon such affidavit or other testimony to the satisfaction of the court, an order or decree showing that due notice to creditors has been given, and directing that such order or decree be entered in the minutes and recorded, must be made by the court.

Arizona. — Same. Rev. Stats., sec. 1109.

Idaho. — Same. Rev. Stats., sec. 5426.

Montana. — Same. Comp. Stats., p. 310, sec. 149.

Nevada. — See Gen. Stats., sec. 2797, under § 144, *ante*.

Oregon. — "Before the expiration of the six months mentioned in the last section [1131, under § 44, *ante*], a copy of the notice as published, with the proper proof of publication, shall be filed with the clerk." Hill's Laws, sec. 1132.

Utah. — Same as California, except that "within thirty days" is prefixed to the section. Comp. Laws, sec. 4122.

Washington. — "After the notice shall have been published, a copy thereof, together with the affidavit attached thereto of the publisher or printer of the paper in which the same was published, shall be filed by the executor or administrator in court." Code Proc., secs. 978.

Wyoming. — "After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication, must be filed in the office of the clerk of court." Laws 1890-91, p. 270, sec. 2.

Proof of Publication, how Made: Cal. Code Civ. Proc., secs. 2010, 2011.

The affidavit of publication is only *prima facie* evidence of the facts therein stated, and may be contradicted by the files of the newspaper in which the notice was published, showing that the notice was not published for the statutory time: *Wise v. Williams*, 88 Cal. 30.

A decree establishing due notice to creditors is not conclusive, and may be controlled by proof that the publication was insufficient: *Id.*

Form No. 119.—Decree Establishing Notice to Creditors.

[Title of Court and Estate.]

It appearing to the satisfaction of this court that due and legal notice to the creditors of said estate has been given,—

It is hereby ordered, adjudged, and decreed that due and legal notice to the creditors of said —, deceased, has been given, and that this decree be entered in the minutes of this court and recorded. —, Judge of the — Court.

Dated —, 18—.

§ 147. [1493.] Time within Which Claim Presented.—All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; *provided, however*, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court, or a judge thereof, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered.

Arizona. — Same, except that the words of the above section are preceded by the following: "If a claim arising upon a contract heretofore made be not presented within the time limited in the notice, it is barred forever, except as follows: If it be not then due, or if it be contingent, it may be presented within one month after it becomes due or absolute; if it be made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the probate judge, that the claimant had no notice, as provided in this chapter, by reason of being out of the territory, it may be presented any time before a decree of distribution is entered. A claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or pledged must be presented within one month after such deficiency is ascertained." Rev. Stats., sec. 1110.

Idaho. — Same as California. Rev. Stats., sec. 5463.

Montana. — Same as Arizona. Comp. Stats., p. 310, sec. 150.

Nevada. — "If a claim be not presented within four months after the first publication of the notice, it shall be barred forever; *provided*, if it be not then due, or if it be contingent, it may be presented within four months after it shall become due or absolute; *and provided further*, that when it shall be made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the probate judge, that the claimant had no notice, as provided in this act, by reason of the absence from this territory, it may be presented at any time before a decree of distribution is entered." Stats. 1891, p. 105, sec. 3, amending Gen. Stats, sec. 2798.

Oregon. — "A claim not presented within six months after the first publication of the notice is not barred, but it cannot be paid until the claims presented within that period have been satisfied; and if the claim be not then due, or if it be contingent, it shall nevertheless be presented as any other claim. Until the administration has been completed, a claim against the estate not barred by the statute of limitations may be presented, allowed, and paid out of any assets then in the hands of the executor or administrator not otherwise appropriated or liable." Hill's Laws, sec. 1132.

Utah. — Same as California. Comp. Laws, sec. 4123.

Washington. — "If a claim be not presented within one year after the first publication of the notice, it shall be barred." Code Proc., sec. 979.

Wyoming. — Same as California. Laws 1890-91, p. 270, sec. 3.

A claim presented by the executor of one estate against the estate of another decedent is sufficiently verified if in the verification thereof it is stated that the affiant is the executor of the estate in whose behalf the claim is made; that the amount, stating it, is justly due to affiant as such executor; "that no payments have been made thereto which are not credited, and that there are no offsets to the same, to the knowledge of said claimant"; and stating that the reason why affiant makes the claim is, that affiant's tes-

tator is dead, inasmuch as it appears from such verification that affiant and claimant are the same person: *Davis v. Browning*, 91 Cal. 605.

Statute of Limitations: See § 152, *post*. Claim allowed not affected by statute of limitations: See § 213, *post*.

Claims secured by liens on homesteads must be presented: See § 137, *ante*.

Interest on Claim: See next section.

Claim must be presented within the time prescribed by law: *Davidson v. Rankin*, 34 Cal. 503. A claim

may be presented before the publication of notice to creditors: *Janin v. Browne*, 59 Cal. 37; *Ricketson v. Richardson*, 19 Cal. 330.

A party holding a claim against an estate is not bound to present it until after the publication of notice to creditors: *Quivey v. Hall*, 19 Cal. 97; *Smith v. Hall*, 19 Cal. 85; and the statute of limitations does not run against it if presented in the time limited by said notice: *Quivey v. Hall*, 19 Cal. 98.

The statute of limitations does not run in favor of an estate during the time there is no qualified administrator of an estate: *Quivey v. Hall*, 19 Cal. 97; *Smith v. Hall*, 19 Cal. 85.

An administrator cannot waive the necessity of presenting a claim: *Harp v. Calahan*, 46 Cal. 222.

The duty to present a claim is governed by the law in existence at the time the notice to creditors was published, not by the law in existence when the mortgage was executed or when action thereon was commenced: *Hibernia S. & L. Soc. v. Hayes*, 56 Cal. 297.

The claim which the creditor of an estate may have against the executor by reason of the latter's act or omissions is not contingent on the fact that the estate may prove insolvent, and in the event of the executor's death such claim must be presented against his estate: *In re Halleck*, 49 Cal. 111.

The surviving partner, for advances to the partnership, should not present a claim to the administrator of his deceased partner until the partnership affairs are wound up, after which time he has the same time as was allowed other creditors to present his claim: *Glenon v. White*, 34 Cal. 258.

A surviving partner cannot bring suit against the administrator of a deceased partner for his interest in the partnership assets without first presenting his claim to the administrator, where all the assets have been taken possession of by such administrator: *McKay v. Joy*, 70 Cal. 581.

A claim for overcharged rent against joint lessors who are partners need not be presented as a claim against the estate of a deceased partner, in order to enforce it against the firm; nor need the executors of the deceased partner be joined

as parties to an action to enforce such claim against the firm, and if joined, a judgment against the firm is not erroneous because not requiring that the amount awarded be paid in due course of administration of the deceased partner's estate: *Corson v. Berson*, 86 Cal. 434.

The provision of law that it must appear to the satisfaction of the administrator and judge that the claimant had no notice gives to these officers no power or right to arbitrarily say they are not satisfied, and to therefore reject a claim. An affidavit of the claimant showing to the satisfaction of a reasonable, fair, and impartial mind that he had no notice is all that is required: *Cullerton v. Mead*, 22 Cal. 96.

Presentation to the administratrix of a plaintiff's claim for the amount of a note is not in any sense a demand of payment: *Chase v. Evoy*, 49 Cal. 467.

Executor cannot present a claim to himself as an attorney in fact of another person: *In re Keenan*, Myr. Prob. 186.

The words "claims" and "claimant" are used as synonymous with the words "legal demand" and "creditor": *Gray v. Palmer*, 9 Cal. 616.

If the deceased, during his lifetime, mingled trust funds with his own, the cestui que trust only has a claim against the estate, and he must present it to the administrator for allowance: *Lathrop v. Bampton*, 31 Cal. 17.

A vendor has a lien on the real estate, sold to deceased, in the hands of his administrator, for the unpaid purchase-money: *Cahoon v. Robinson*, 6 Cal. 225.

Claim need not be presented by vendor to estate of deceased vendee for unpaid purchase-money, where vendor proceeds only against the property, and demands nothing from the estate: *Kerns v. Dean*, 77 Cal. 555.

"Claims" against estates of decedents are such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money upon which a money judgment could have been rendered: *Fullon v. Butler*, 21 Cal. 24;

In re McCausland, 52 Cal. 568; *Stuttmeister v. Superior Court*, 72 Cal. 487.

The word "claim," as used in the probate law, is broad enough to include mortgage: *Ellis v. Polhemus*, 27 Cal. 350.

A note secured by a mortgage is a claim against the estate, but the mortgage given to secure the note is not such claim: *Ellis v. Polhemus*, 27 Cal. 350.

Claimant of specific property is not bound to present a claim: *Gunter v. Jones*, 9 Cal. 643.

Presentation of claim secured by a pledge is not necessary, but administrator, in paying such debt without presentation of claim, takes the risk of the property being of a greater value than the amount secured by it: *In re Idenmuller*, Myr. Prob. 87.

The payee and legal owner, and not the equitable owner, of a note and mortgage, so long as it remains unassigned, is the proper person to present the same for allowance; and if he does not do so within the time required by law, it is barred. The fact that the equitable owner resided out of the state, and did not know of the death of the payor, does not change the rule: *Marsh v. Dooley*, 52 Cal. 232.

Where a promissory note is executed by one person and a mortgage to secure the debt is given by another, if the payor of the note dies, and the holder thereof does not present his claim thereon to the administrator of deceased for allowance, the claim is barred as against the estate, but the mortgage remains in force against the mortgaged property. The rule is the same when the note is made by the husband for his own debt, and the wife mortgages her separate property to secure it, and the husband signs the mortgage to show his consent to it, and dies. This limitation applies solely to the claim against the estate, but does not affect the validity of the debt against other persons or their property: *Sichel v. Carillo*, 42 Cal. 493.

A wife, by mortgaging her separate estate to secure a note of her husband, does not create a claim against her estate: *Hibernia Sav. & Loan Soc. v. Conlin*, 67 Cal. 178.

In settling a claim, defendant's testator, in consideration of services

rendered by plaintiff in obtaining a settlement, by which the former had obtained two promissory notes, agreed to hold and collect them and to pay plaintiff one half of the amount received. Said testator assigned one of the notes for value, and then died. After his death this note was paid to the assignee. Plaintiff commenced this action to compel the executrix to assign and deliver the other note to him. It was held that upon the payment of the assigned note the plaintiff might have claimed one half of the amount; that his claim in such case should have been presented within the time prescribed by law; but that he could elect to regard the two notes as an entire fund, and to take the unpaid note as his share thereof; and that in such case it was not necessary to present his claim: *Sharpstein v. Friedlander*, 54 Cal. 58.

Interest is not recoverable upon the face of a paper that does not show that interest necessarily results from the facts upon which the claim is based: *Aguirre v. Packard*, 14 Cal. 171.

A promissory note of deceased assigned to a mortgagor whose mortgage was held by a deceased mortgagee, and which note was due and payable at the time of the death of the deceased, but was not presented to his administrator for allowance, cannot be set off against the mortgage debt, nor could such demand be set off against the mortgage debt if the former is barred by the statute of limitations at the time of the commencement of the foreclosure suit: *Lyon v. Petty*, 65 Cal. 322. A mortgagee is entitled to credit upon his mortgage for money paid upon an order given by the mortgagor, but not paid until after his death, or for money paid by order of the probate court: *Murdock v. Clarke*, 59 Cal. 683.

Taxes are part of the "expenses of administration," and not "claims" against an estate: *People v. Olvera*, 43 Cal. 492.

A street assessment made after the death of the property owner is not required to be presented to the administrator for allowance as other claims: *Hancock v. Whittemore*, 50 Cal. 522.

Sureties who have paid the principal's debt may enforce a claim

therefor against his estate after he has died: *In re Hill*, 67 Cal. 238.

A judgment against sureties for the debt of their principal must be paid by them before they can enforce a claim against his estate: *In re Hill*, 67 Cal. 238.

Contract to cut timber on government land is lawful, and claim thereunder is allowable: *In re Whitmore*, Myr. Prob. 103.

Demand of husband to have property in the hands of deceased wife's executor declared community property, and delivered to him, amounts to a claim against her estate, and should be presented as such: *In re Rowland*, 74 Cal. 523.

A claim against the estate of a deceased executor must show that his accounts are unsettled and that there is an amount due from him to the estate of which he was executor: *In re Halleck*, Myr. Prob. 46; affirmed 49 Cal. 111.

Balance due from an executor on an account settled, since which he has died, is not a judgment so as to make it a preferred claim against his insolvent estate: *In re Kehoe*, Myr. Prob. 127.

A claim by a married woman for nursing decedent is community property, and should be presented in the name of the husband. When such claim is verified by the wife, and presented in her name by the husband, a judgment in an action by husband and wife against the executors to recover such claim will not be reversed: *Smith v. Furnish*, 70 Cal. 424.

If an action to enforce a trust be against a person in his lifetime, it will lie against his executor; but so far as it is a case in equity to reach specific property, or a specific fund held in trust, if the party seeking to enforce the trust cannot identify the property, he must rely upon the personal liability of the trustee, and after the trustee's death the *cestui que trust* has only a claim against the estate, which must be presented to the executor for allowance; if he can identify the property in the hands of the executor, the latter will be held as a trustee upon the same terms as the testator held the trust: *Lathrop v. Bampton*, 31 Cal. 18; *Gillespie v. Winn*, 65 Cal. 429; *Wells, Fargo, & Co. v.*

Robinson, 13 Cal. 133; *Gunter v. Janes*, 9 Cal. 643.

Contingent Claims. — Claims which are not due must be presented within the time allowed by law, or they will be barred, and will not constitute a charge against the estate: *Pico v. De la Guerra*, 18 Cal. 422.

The time fixed by statute within which claims must be presented does not commence running until the claim becomes absolute: *Gleason v. White*, 34 Cal. 258.

A contract to pay money, although it falls due after the death of the obligor, survives; as a contingent claim, it may be presented to the representatives of the estate, notwithstanding it may not become due until after the expiration of the time limited in the notice to creditors for the presentation of claims: *Janin v. Brown*, 59 Cal. 37.

Claims against decedent's estates, under the law existing in California in 1872, whether due or not due, should be presented to the administrator within the statutory time after publication of notice to creditors, and unless so presented would be forever barred: *In re Swain*, 67 Cal. 637.

The statute does not provide for the approval of a contingent claim, and where such a claim is presented and duly allowed, such allowance does not give validity to the claim as a judgment against the estate: *Pico v. De la Guerra*, 18 Cal. 422.

Contingent claims and claims not due cannot be presented until the contingency happens or they become due. They must be presented within the time limited by the notice after becoming due or absolute. They must be presented as provided by law: *Pico v. De la Guerra*, 18 Cal. 422.

A contingent claim or one not yet due may be presented to the judge without the affidavit required by law, and the effect might be to cause the money to which the claimant is prospectively entitled to be paid into court, but it does not relieve him from the necessity of duly presenting such claim after it becomes due or absolute before the administrator or executor can be compelled to act upon it: *Pico v. De la Guerra*, 18 Cal. 422.

Practice. — The objection that there was no presentment of the claim cannot be taken for the first time in

the appellate court: *Coleman v. Woodworth*, 28 Cal. 567; *Hentsch v. Porter*, 10 Cal. 555.

Claims based upon equitable causes of action are not claims within the meaning of the statute, and need not be presented to administrator for allowance prior to suit thereon. *Toulouse v. Burkett*, Sup. Ct. Idaho, Feb. 15, 1886.

A claim to subject property fraudulently conveyed by decedent to a judgment is not barred because not presented within ten months: *O'Doherty v. Toole*, Sup. Ct. Ariz., Sept. 25, 1887.

A claim in favor of the United States against an estate cannot be sued upon until it is presented for allowance to an executor of a decedent. *United States v. Halley*, Sup. Ct. Idaho, Sept. 13, 1882.

In presenting a claim, the local probate laws govern and determine the procedure: *United States v. Halley*, Sup. Ct. Idaho, Sept. 13, 1882.

Money laid out and expended for the benefit of the estate of another after his death becomes a claim against such estate, and must be presented for allowance, the same as other

claims: *Rutherford v. Tallant*, 6 Mont. 132.

Where the claim is based upon a subscription for shares of stock, it is not necessary to present for allowance a claim for the amount due to the administrator: *Thompson v. Reno Sav. Bank*, 19 Nev. 242; 3 Am. St. Rep. 883.

The failure to file a claim works only a disability in the creditor to enforce it; nevertheless there may be a valid payment of it by an administrator: *Adams v. Smith*, 19 Nev. 259.

When one of the members of a firm who are makers of a negotiable promissory note dies before the maturity of the note, presentment should be made to, and demand of, the surviving maker, and not the executor of the deceased partner. In such case it is not required that the claim be presented to the administrator of the deceased partner for allowance before commencing suit against the surviving partner: *Barlow v. Cogan*, 1 Wash. Ter. 257.

A pledgee is not obliged to present his claim to executor of a deceased pledgor unless he seeks to recover against other property of the estate: *In re Galland*, 92 Cal. 293.

Form No. 120. — Creditor's Claim against Estate.

[Title of Court and Estate.]

— hereby presents his claim against the above-named estate to —, the administrator thereof, as follows, to wit:—

The Estate of —.

Debtor to —.

To amount of principal sum of promissory note, a copy

of which is attached hereto \$—

To amount of interest due thereon to date —

COPY OF SAID NOTE.

(Here insert copy of note.)

The above note is secured by a mortgage dated on the — day of —, A. D. 18—, upon the following described property, to wit (here insert description); and said mortgage was executed by said —, deceased, and was duly recorded in the office of the county recorder of the — county of —, state of — (that being the county in which said land is situated), on the — day of —, A. D. 18—, in Book — of Mortgages, pages —, of the records of said county;

And also for goods, wares, and merchandise sold to said deceased, at his request, as follows:—

1887

Jan. 2.	One sack of flour	\$—
etc.	etc.	etc.
Total		\$—

State of —, }
 — County of —. } ss.

—, whose foregoing claim is herewith presented to the — of said deceased, being duly sworn, says that the amount thereof, to wit, the sum of — dollars, is justly due to the said claimant; that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of said claimant. —

Subscribed and sworn to before me this — day of —, 18—. —, Notary Public.

The within claim is hereby allowed for the sum of \$—.

—, Administrator.

The within claim is hereby allowed and approved for the sum of \$—. —, Judge of the — Court.

The within claim is hereby rejected.

—, Administrator (or —, Judge of — the Court).

§ 148. [1494.] Claims Allowed to Bear Interest as Judgments.—Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate be in-

solvent, no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors than is allowed on judgments obtained in the superior court.

Arizona. — Same, except that the words "claimant or" are inserted in first sentence before the last word, "affiant," and the following is added to the section, to wit: "When it shall appear, upon the settlement of the accounts of any executor or administrator, that debts against the deceased have been paid without the affidavit and allowance prescribed in this section, and it shall be proven by competent evidence, to the satisfaction of the probate court, that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of the said accounts." Rev. Stats., sec. 1111.

Idaho. — Same as California. Rev. Stats., sec. 5464.

Montana. — Same as California. Comp. Stats., sec. 311, p. 151.

Nevada. — "Every claim presented to the administrator shall be supported by the affidavit of the claimant that the amount is justly due, that no payments have been made thereon, and that there are no offsets to the same, to the knowledge of the claimant or other affiant; *provided*, that when the affidavit is made by any other person than the claimant, he shall set forth in the affidavit the reasons it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. The amount of interest shall be computed and included in the statement of the claim and the rate of interest determined; *provided*, that no claim which shall have been due and payable thirty days prior to the death of the deceased shall bear greater interest than ten per cent per annum from and after the time of issuing letters." Gen. Stats., p. 714, sec. 2799.

Oregon. — "Every claim presented to the executor or administrator shall be verified by the affidavit of the claimant, or some one on his behalf, who has personal knowledge of the facts, to the effect that the amount claimed is justly due, that no payments have been made thereon, except as stated, and that there is no just counterclaim to the same, to the knowledge of the affiant. When it appears or is alleged that there is any written evidence of such claim, the same may be demanded by the executor or administrator, or that its nonproduction be accounted for." Hill's Laws, sec. 1133.

Utah. — Same as California. Comp. Laws, sec. 4124.

Washington. — "Every claim presented to the administrator shall be supported by the affidavit of the claimant that the amount claimed is justly due, that no payments have been made thereon, and that there are no offsets to the same, to the knowledge of the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers to be produced in support of the claim." Code Proc., p. 419, sec. 980.

Wyoming. — Same as California; last sentence omitted. Laws 1890-91, p. 270, sec. 4.

Judgments are exempted from the provision of law requiring an affidavit to be attached to a claim showing that it is due, and that there have been no payments and are no offsets: *Cullerton v. Mead*, 22 Cal. 96.

No presentation of a claim is effectual without an affidavit of its justice: *Pico v. De la Guerra*, 18 Cal. 422.

Presentation of claims duly verified applies only to such claims as are debts against the estate, and not to expenses or disbursements incurred or made by the administrator: *Deck v. Gherke*, 6 Cal. 666.

An action cannot be maintained against an executor upon a rejected claim when it appears that the affidavit attached to the claim was made before a United States court commissioner: *Winder v. Hendricks*, 56 Cal. 464.

Funds received by executor are held in his official capacity; and if he has a claim against his testator's estate, such funds are not an offset thereto, and he is not prevented from making the affidavit required by this section by reason of having such funds on hand: *In re Hildebrandt*, 92 Cal. 433.

A claim against the estate of a deceased executor must show that his accounts are unsettled and that there is an amount due from him to the estate of which he was executor: *In re Halleck*, Myr. Prob. 46; affirmed 49 Cal. 111.

A statement of a claim consisting of a balance struck upon an account between the claimant and decedent is sufficient, if properly verified, for presentation to the administrator: *In re Swain*, 67 Cal. 637.

Where the claim against an estate of a decedent is verified by an affidavit stating that "the amount thereof, to wit, the sum of four hundred, is justly due," the word "dollars" being omitted, such omission will not affect the validity of the claim, where the defect is supplied by a reference to the body of the claim: *Hall v. Superior Court*, 69 Cal. 79.

A person seeking judgment against the estate of a decedent upon a rejected claim must show at least a substantial compliance with each requirement of the statute on the sub-

ject of the presentation of claims; and where the holders of a mortgage note, in presenting it as a claim against the estate of a deceased mortgagor, make no attempt at complying with the provisions of the statute relating to the affidavit, by which the claim against the estate of a decedent must be supported, they cannot maintain an action against the estate upon the mortgage note: *Perkins v. Onyett*, 86 Cal. 348.

Where the affidavit in support of a mortgage note, which was presented to the executor of a deceased mortgagor, and rejected, as a claim against his estate, was made by an agent of the claimant, and failed to set forth the reason why it was not made by the claimant, and stated that there were no offsets, "to the knowledge of the claimant," instead of "to the knowledge of affiant," as required by the statute, the presentation is fatally defective, and will not support an action or judgment upon the note: *Perkins v. Onyett*, 86 Cal. 348.

Compound interest on mortgage claim cannot be paid by executor when: *In re Titcomb*, Myr. Prob. 55.

Interest on a claim is waived by a stipulation indorsed thereon foregoing any demand beyond a sum named: *In re Bleakley*, Myr. Prob. 235.

A claim duly allowed and approved bears interest from the date of its approval by the judge: *In re Glenn*, 74 Cal. 567.

Claims duly allowed by a decretal order of the court ordering them to be paid in due course of administration are entitled to bear legal interest from the date of such decree, notwithstanding the fact that the indebtedness which was the basis of the claim did not draw interest: *In re Olvera*, 70 Cal. 184.

When the account of a claimant is contested, he should be allowed to amend by filing a more full and particular account: *In re Hidden*, 23 Cal. 362. He should also be given an opportunity to prove that his claim is not barred by the statute of limitations: *In re Hidden*, 23 Cal. 362; *Zachery v. Chamber*, 1 Or. 321.

A claim against the estate of a deceased person for services rendered, which is presented in the form of an

account showing the total number of and the balance due, is sufficient in days of service, the rate of payment form: *Duncan v. Thomas*, 81 Cal. 56. per day, the amount paid on account,

§ 149. [1495.] Judge may Present Claim.—Any judge of a superior court may present a claim against the estate of a decedent for allowance to the executor or administrator thereof, and if the executor or administrator allows the claim, he must, in writing, designate some other judge of the superior court of the same or an adjoining county, who, upon the presentation of such claim to him, is vested with power to allow or reject it, and the judge presenting such claim, in case of its rejection by the executor or administrator, or by such judge as shall have acted upon it, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected.

Arizona.—Same. Rev. Stats., sec. 1112.

Idaho.—Same. Rev. Stats., sec. 5465.

Montana.—Same. Comp. Laws, p. 311, sec. 152.

Nevada.—Same. Gen. Stats., sec. 2800.

Utah.—Same. Comp. Laws, sec. 4125.

Washington.—Same. Code Proc., sec. 983.

§ 150. [1496.] Allowance and Rejection of Claims.
—When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to a judge of the superior court for his approval, who must, in the same manner, indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance, or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary, under seal, shall be *prima facie* evidence of such presentation, and the date thereof. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of

such time. If the claim be payable in a particular kind of money or currency, it shall, if allowed, be payable only in such money or currency.

Arizona. — Same. Rev. Stats., sec. 1113.

Idaho. — Same. Rev. Stats., sec. 5466.

Montana. — Same. Comp. Stats., p. 312, sec. 153.

Nevada. — Same, except that after the words "evidence of such presentation" follows, "and rejection, and if made by any person other than the claimant or notary, the affidavit of such person to the fact shall be *prima facie* evidence of such presentment and rejection." Also, last sentence omitted. Gen. Stats., sec. 2891.

Oregon. — "When the claim is presented to the executor or administrator, as prescribed in the last section, if he shall be satisfied that the claim thus presented is just, he shall indorse upon it the words 'Examined and approved,' with the date thereof, and sign the same officially, and shall pay such claim in due course of administration; but if he shall not be so satisfied, he shall indorse thereon the words 'Examined and rejected,' with the date thereof, and sign the same officially." Hill's Laws, sec. 1134.

Utah. — Same as California. Comp. Laws, sec. 4126.

Washington. — First two sentences same as California. Then follows: "If the executor or administrator reject the claim, he shall notify the claimant forthwith of said rejection." Balance omitted. Code Proc., sec. 981.

Wyoming. — Same as California; second and last sentence omitted, and the word "judge" is also omitted from the section. Laws 1890-91, p. 270, sec. 5.

Limitation of Action on Rejected Claim: See § 152, *post*.

Judge may act upon claim in chambers: Cal. Code Civ. Proc., sec. 166.

If an order is made out of court, and without notice, allowing a claim against an estate, no notice of motion to set it aside is necessary: *In re Sullenberger*, 72 Cal. 549.

An action cannot be maintained against an estate upon a claim which has been presented to and allowed by the executor until ten days after its presentation to the judge, unless he rejects it within that period, and the statute of limitations does not therefore run against such claim during the time intervening between the date of its presentation to the executor and that of its rejection by the judge: *Nally v. McDonald*, 66 Cal. 530.

The executor or administrator is not required to pass upon a claim within ten days; if he re-

fuses to let the claimant know what he has done, the claimant can treat the proceeding as nugatory, and file a new claim, and thus avoid the running of the statute of limitations, which bars an action not brought within three months after the claim is rejected, according to section 1498 of the California Code of Civil Procedure (§ 152, *post*): *Stewart v. Hinkel*, 72 Cal. 187.

The allowance of a claim stays the running of the statute of limitations: *In re Schroeder*, Myr. Prob. 7; affirmed 46 Cal. 304.

Where a claim has been duly presented, and the executor neglects to act thereupon for more than ten days, the claim only becomes a rejected claim on the expiration of ten days: *Rice v. Inskeep*, 34 Cal. 224.

Where the original claim against the estate has been allowed by the executor and subsequently lost, the approval by the judge of a copy thereof has the same effect as an approval of

the original: *Rice v. Inskeep*, 34 Cal. 224; *Nally v. McDonald*, 66 Cal. 530.

Where claims against estates of decedents are allowed and approved as presented, it is presumed that they were allowed upon vouchers and proofs to the satisfaction of the administra-

tor and probate judge; as where more than legal interest is allowed on an account, a written contract for the payment of such rate of interest will be presumed, in the absence of evidence to the contrary: *In re Swain*, 67 Cal. 642.

Form No. 121. — Certificate of Notary of Presentation of Claim.

[Title of Court and Estate.]

I, —, a notary public in and for the — county of —, state of —, hereby certify that at the request of —, named in the annexed claim, I, said notary public, did, on the — day of —, A. D. 18—, present the annexed claim to —, the administrator of the estate of —, deceased, personally, at the place mentioned in the notice to creditors heretofore published herein, to wit (here insert place), and demanded of him, the said administrator, that he indorse upon said claim his allowance or rejection thereof; and I further certify that after the lapse of ten days I again demanded of said administrator, personally, that he act upon said claim as aforesaid, and thereupon he returned the said claim to me, but refused and neglected to make any indorsement thereon.

Witness my hand and official seal this — day of —, A. D. 18—.

[SEAL]

—, Notary Public.

§ 151. [1497.] **Claims—Filing—Secured—Lost.**— Every claim allowed by the executor or administrator, and approved by a judge of the superior court, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim be founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it is lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim, or any part thereof, be secured by

a mortgage or other lien which has been recorded in the office of the recorder of the county in which the land affected by it lies, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record. If, in any case, the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance.

Arizona. — Same. Rev. Stats., sec. 1114.

Idaho. — Same. Rev. Stats., sec. 5467.

Montana. — Same. Comp. Stats., p. 312, sec. 154.

Nevada. — The words "or a copy thereof, as hereinafter provided," omitted from the first sentence. Second sentence as follows: "If the claim be founded on a bond, bill, note, or other instrument, the original instrument shall be presented, and the allowance and approval, or rejection, shall be indorsed thereon, or be attached thereto." Third sentence same. Then follows: "And in all cases it shall be permitted to the claimant to withdraw his claim from file on leaving a certified copy, with a receipt indorsed thereon by himself or his agent." Provision as to entry by clerk in register same. Also contains the following additional provision: "Provided, if such original instrument be lost or destroyed, then, in lieu thereof, the claimant shall be required to file his affidavit, particularly describing such instrument, and stating the loss or destruction thereof, upon which affidavit the indorsement hereinafter mentioned shall be made." Gen. Stats., sec. 2802.

Utah. — Same as California. Comp. Laws, sec. 4127.

Washington. — "Every claim which has been allowed by the executor or administrator and the said judge shall be filed in the court and be ranked among the acknowledged debts of the estate, to be paid in course of the administration." Code Proc., sec. 982.

Wyoming. — Same as California, except that the claim must be approved by the court. Laws 1890-91, p. 271, sec. 6.

The presentation of a claim stops the running of the statute of limitations against it: *Beckett v. Selover*, 7 Cal. 241.

The statute of limitations does not begin to run when no administration exists on the decedent's estate at the time the cause of action accrued: *Smith v. Hall*, 19 Cal. 85; *Danglada v. De la Guerra*, 10 Cal. 386.

A claim of an administrator, although it has been allowed by the court, will

be barred, if he fails for thirteen years, there being no personal property to pay the claim, to institute proceedings for the sale of realty belonging to the estate to pay such claim: *Wingarter v. Wingarter*, 71 Cal. 105.

Statute of Limitations: Cal. Code Civ. Proc., secs. 335-363.

No substantial change in a claim on file can be made, either by amendment or otherwise, after the expiration of the time for the presen-

tation of claims: *In re Sullenberger*, 72 Cal. 549.

The statute of limitations does not run in favor of an estate against claims which have been allowed nor against judgments which have been recovered against an administrator for a debt of the estate while the estate is being administered: *In re Schroeder*, 46 Cal. 305.

The statute of limitations does not affect allowed claims until the administrator is discharged: *Dohs v. Dohs*, 60 Cal. 255. See also § 213, *post*, to the same effect.

Allowance of a claim by the administrator and judge prevents its being barred by the statute of limitations, even though it is not filed in the court: *Willis v. Farley*, 24 Cal. 490.

The allowance of a claim and its filing has the effect of a judgment, in the sense that it determines the estate's indebtedness judicially, but before such claim passes into a final judgment there must be a decree of the court directing it to be paid: *Magraw v. McGlynn*, 26 Cal. 420; *In re Hidden*, 23 Cal. 362; *Pico v. De la Guerra*, 18 Cal. 422; *Beckett v. Selover*, 7 Cal. 215. See § 295, *post*.

When there are two or more administrators, the allowance of a claim against the estate by one is the act of all, and binding upon all: *Willis v. Farley*, 24 Cal. 490.

A claim which has been duly approved and filed is ranked among the acknowledged debts of the estate, to be paid in due course of administration: *In re Lohse*, 62 Cal. 413.

An allowed claim against an estate has the force and effect of a judgment payable in due course of administration; and it is the duty of a claimant to file an allowance of part of his claim in the court within thirty days, to be paid in due course of administration; and he is not estopped by such action to sue either at law or in equity for the portion disallowed: *Walkerty v. Bacon*, 85 Cal. 137.

In order to present a mortgage as a claim against the estate of a deceased mortgagor, it is necessary either to accompany the claim by a copy of the mortgage, or to describe it by reference to the date, volume, and page of its record. It is not suffi-

cient to present the copy of the note which states that it is secured by mortgage of even date therewith: *Bank of Sonoma County v. Charles*, 86 Cal. 322.

The presentation of a note secured by mortgage as a claim against the estate of a deceased mortgagor without a presentation of the mortgage does not have the effect to waive the mortgage, when there was no intention to waive or abandon it, but it was evidently supposed that the presentation of the note was a presentation of the mortgage also: *Bank of Sonoma County v. Charles*, 86 Cal. 322.

Foreclosure of a mortgage is peculiarly an equity proceeding, and when a court takes jurisdiction of the case, it has the right to give full relief, and for this purpose to decree and execute a sale of the mortgaged premises. When the claim has been presented and allowed by the administrator and court, it is otherwise: *Belloc v. Rodgers*, 9 Cal. 123.

A mortgage debt due by an estate stands as any other debt, and its allowance gives it all the virtues which a judgment against executors can have, and a foreclosure suit is not necessary. The policy of the law is against burdening an estate with unnecessary costs. A bill in equity to foreclose such a mortgage will not lie: *Falkner v. Folsom's Ex'r*, 6 Cal. 412.

When a claim has been duly allowed, it cannot be subsequently attacked by the administrator on the ground that the services were rendered on an agreement for contingent fees only, or that they were not worth the amount charged and allowed: *In re McKinley*, 49 Cal. 152.

An objection that a claim was never presented to the administrator cannot be made after a decree allowing it: *In re Cook*, 14 Cal. 129.

An objection that the claim has not been presented for allowance or rejection, if not raised in the court below, cannot be raised in the supreme court: *Coleman v. Woodworth*, 28 Cal. 567; *Hentsch v. Porter*, 10 Cal. 555.

It is error in the court, on final settlement of accounts, to reject sums paid on allowed claims. This rule does not apply to expenses incurred or disbursements made in due course

of administration: *Deck's Estate v. Gherke*, 6 Cal. 666.

The claim of an attorney for services rendered to the estate of a deceased person, when allowed and approved by the probate court, not as costs, but to be paid in due course of administration, becomes one of the "acknowledged debts of the estate, to be paid in due course of administration," and an order for its payment is appealable, under section 963 of the Code of Civil Procedure (§ 135, *ante*), which provides that an appeal lies to the supreme court from certain orders of the superior court in probate proceedings, among which are orders for the payment of a debt, claim, legacy, etc.; and after an appeal taken by an administrator from such an order of the superior court, and the filing of a *supersedeas* bond, the action of the superior court in fining the administrator for contempt for refusing to pay the claim of the attorney is in excess of its jurisdiction: *Stuttmeister v. Superior Court*, 72 Cal. 487.

The requirement that claims which have been allowed and judgments against administrators must be filed in court is merely directory: *In re Schroeder*, 46 Cal. 304.

A claim verified and filed with the county clerk, but not presented, is no charge upon the estate: *Pico v. De la Guerra*, 18 Cal. 422.

Time in which suit must be brought: *Smith v. Hall*, 19 Cal. 85.

Claims must first be presented to the administrator for his allowance, else no action can be maintained to charge the estate therewith: *Eustace v. Jahns*, 38 Cal. 3; *Dodson v. Nevitt*, 5 Mont. 518.

The rejection referred to in the above section from the date of which the time for bringing an action begins to run is an *actual rejection* of the claim by the personal representative of a deceased person, and it has no reference to the refusal by or neglect of the personal representative to indorse on the presented claim a refusal or rejection for ten days after the claim has been presented to him. Such refusal or neglect to indorse may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day after the presentation: See § 150, *ante*. This clause is inserted only to enable the claimant to bring his action after the lapse of the tenth day, if he so elect, on the occurrence of such neglect or refusal. An action is therefore commenced in time, though it was brought more than three months after the *deemed rejection*: *Bank of Ukiah v. Shoemaker*, 67 Cal. 147.

Claims allowed and approved cannot be garnished in the hands of an executor or administrator, where no order of distribution to creditors has been made, neither can they be seized and sold under an execution against the claimant: *Norton v. Clark*, 18 Nev. 247.

§ 152. [1498.] Rejected Claims.—When a claim is rejected either by the executor or administrator, or a judge of the superior court, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred.

Arizona.—Same. Rev. Stats., sec. 1115.

Idaho.—Same. Rev. Stats., sec. 5468.

Montana.—Same. Comp. Stats., p. 313, sec. 155.

Nevada.—Same, except time after debt becomes due is three months. Gen. Stats., sec. 2803.

Oregon.—"If any executor or administrator shall refuse to allow any claim or demand against the deceased, after the same may have been exhibited

to him in accordance with the provisions of this act, said claimant may present his claim to the county court for allowance, giving the executor or administrator ten days' notice of such application to the court. The court shall have power to hear and determine in a summary manner all demands against any estate agreeably to the provisions of this act, and which have been so rejected by the executor or administrator, and shall cause a concise entry of the order of allowance or rejection to be made on the record, which order shall have the force and effect of a judgment from which an appeal may be taken as in ordinary cases." Hill's Laws, sec. 1134.

Utah. — Same as California. Comp. Laws, sec. 4128.

Washington. — Same as California, except that the following is omitted: "If it be then due, or within two months after it becomes due." Code Proc., sec. 934.

"In an action against an executor or administrator as such, the remedies of arrest and attachment shall not be allowed on account of the acts of his testator or intestate; but for his own acts as such executor or administrator, such remedies shall be allowed for the same causes in the manner and with like effect as in actions at law generally." Code Proc., sec. 710.

Wyoming. — Same as California, except that the word "judge" is omitted. Laws 1890-91, p. 271, sec. 7.

A claim may be considered rejected, and suit brought thereon, if administratrix does not allow it within ten days after it is left with the clerk of her attorney at the attorney's office, that being the place designated in notice to creditors, and thereafter suit may be brought thereon: *Ruddan v. Doane*, 92 Cal. 555.

In a suit against an estate for money had and received by a decedent, it must be distinctly proven that decedent individually received such money when he was a member of a firm by whom the money was received: *Ruddan v. Doane*, 92 Cal. 555.

An action may be maintained against the executor of a decedent to foreclose a mortgage on property of decedent's estate, without presenting the claim first, if all recourse against other property of such estate is waived. The action is not barred because the time for presenting claim expired before it was commenced: *German Sav. & Loan Soc. v. Fisher*, 92 Cal. 502.

When an administrator rejects a legal claim, and a judgment is afterwards recovered thereon, the claimant is entitled to interest from the time of presenting his claim to the administrator: *Pico v. Stevens*, 18 Cal. 376.

In an action against an administra-

tor upon a rejected claim, proof must be made of the signature of the administrator to such rejection: *Bank v. Spect*, Sup. Ct. Cal., Aug. 3, 1866 (not reported), No. 11,175.

Where decedent bequeathed to his nurse a certain sum in payment for her care of him, if in such case she commences an action against the estate to recover the value of such services, she will be deemed to have elected not to claim the bequest, and it will not bar her suit: *Smith v. Furnish*, 70 Cal. 424.

Presentation is sufficiently averred, where the complaint alleged that the claim was presented to the administrator within the time limited by the notice to creditors, and a copy of the claim with the verification annexed and with the indorsements thereon was attached to the complaint: *Janin v. Browne*, 59 Cal. 37.

A complaint alleging that plaintiff duly presented her claim to the administratrix duly verified cannot be objected to by general demurrer. Though indefinite and uncertain, it will support a judgment for the plaintiff: *Chase v. Evoy*, 58 Cal. 348.

Where, in a suit upon a claim against an estate, plaintiff alleges that on a certain day his claim duly verified

was duly presented to defendants as executors for allowance, and defendants deny that on said day the claim of plaintiff for thirty-six thousand dollars, . . . or the claim as in plaintiff's complaint set forth, or the claim upon which this action is founded, or any claim whatever, was duly presented to these defendants for allowance, such denial, though open to criticism, is sufficient: *Rosland v. Madden*, 72 Cal. 17; Cal. Code Civ. Proc., sec. 475.

An action does not lie against an executor or administrator for false imprisonment caused by a testator or intestate in his lifetime: *Harker v. Clark*, 57 Cal. 245.

An action cannot be maintained by a ward against the administrator of his deceased guardian, to recover a sum of money received by the guardian in trust, unless the claim has been presented to such administrator for allowance, or unless the trust fund has come into the hands of the administrator: *Gillespie v. Winn*, 65 Cal. 429.

Parties to action against estate may testify as to any facts occurring subsequent to the death of the deceased: *Fox v. Tay*, 89 Cal. 339.

Sufficiency of Denial.—In an action upon a claim against an estate, an allegation that the claim, duly verified, has been presented is sufficiently controverted by an affirmative allegation in the answer, that the claim was not verified or presented as required

by the statute, and such averment raises a material issue, sufficient to render erroneous a judgment for plaintiff upon the pleadings: *Derby v. Jackman*, 89 Cal. 1.

In an action against an executor to recover a balance due upon a mutual account between the testator and the plaintiff, where the items claimed were duly set forth in the claims presented and in the complaint, and the court finds as an ultimate fact that the estate was indebted to the plaintiff in a sum less than the amount claimed, the finding is conclusive upon an appeal from the judgment taken by the executor upon the judgment roll only, and the judgment will be affirmed upon such appeal: *Merithew v. Orr*, 90 Cal. 363.

Actions on claims: *Wick v. O'Neale*, 2 Nev. 303.

When a claim against a decedent's estate is rejected by the judge of the probate court, no appeal lies from the order of the probate court rejecting the claim. The holder's remedy is exclusively by suit, in the proper court, against the executor or administrator: *Wilkins v. Wilkins*, 1 Wash. Ter. 87.

Where claim held by administrator is disallowed by the probate judge, the administrator's only remedy is to resign his trust, and bring suit as any other creditor of the estate: *Wilkins v. Wilkins*, 1 Wash. Ter. 87.

§ 153. [1499.] Limitations.—No claim must be allowed by the executor or administrator, or by a judge of the superior court, which is barred by the statute of limitations. When a claim is presented to a judge for his allowance, he may, in his discretion, examine the claimant and others on oath, and hear any legal evidence touching the validity of the claim.

Arizona.—Same. Rev. Stats., sec. 1116.

Idaho.—Same. Rev. Stats., sec. 5469.

Montana.—Same. Comp. Stats., p. 313, sec. 156.

Nevada.—Same; last sentence omitted. Gen. Stats., sec. 2804.

Oregon.—Same as Nevada. Hill's Laws, sec. 1134.

Utah.—Same. Comp. Laws, sec. 4129.

Washington.—Same as Nevada. Code Proc., sec. 985.

Wyoming.—Same as California, except that in the first sentence the

words "or a judge of the superior court" are omitted, and in the second sentence, after the word "judge," the words "or commissioner" are interpolated. Laws 1890-91, p. 271, sec. 8.

The allowance and approval of a claim against the estate of a deceased person by the administrator and judge stops the running of the statute of limitations against the claim: *Wise v. Williams*, 88 Cal. 30.

Claims barred by the statute of limitations cannot be allowed: *Dortland v. Dortland*, 66 Cal. 189.

Statute of limitations ceases to run against a claim due from an estate from the time of its presentation to the executor or administrator: *Nally v. McDonald*, 66 Cal. 530.

Statute of limitations does not run during the time that there is no administrator of an estate: *Danglada v. De la Guerra*, 10 Cal. 386; *Smith v. Hall*, 19 Cal. 85.

An action is not commenced, so as to stop the running of the statute of limitations, where an administrator who is a mortgagee, and his decedent, the mortgagor, transfers the mortgage to plaintiff, who sues to foreclose while such mortgagee was administrator, and subsequently the mortgagee, being no longer such administrator, causes himself to be substituted as plaintiff. The time of substitution will be deemed the time of commen-

cing the action: *Brown v. Mann*, 71 Cal. 192.

Transactions between the maker of a promissory note and the executor of the payee, showing that the dealings were not carried on by the executor as such, but in his personal character, and a simple permission given by the maker to the executor that he might apply any balance of accounts there might be in his favor to the payment of the note belonging to the estate, will not take such a note out of the statute of limitations: *In re Sullenberger*, 72 Cal. 549.

An action barred by limitation against the personal representatives of a decedent is also barred against the heirs of a decedent, though they be under disability: *McLeran v. Benton*, 73 Cal. 329.

A right of action having accrued to one not under a disability, who died without commencing an action upon such right, the fact that those claiming under decedent by virtue of such right are under a disability does not stop the running of the statute of limitations: *McLeran v. Benton*, 73 Cal. 329.

§ 154. [1500.] Claims must be Presented before Suit.—No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action, unless such claim be so presented.

Arizona.—Same. Rev. Stats., sec. 1117.

Idaho.—Same, except clause concerning counsel fees is omitted. Rev. Stats., sec. 5470.

Montana.—Same as California, to the word "except"; balance omitted. Comp. Stats., p. 313, sec. 157.

Nevada.—Same as Montana. Gen. Stats., sec. 2805.

Oregon. — "Such action shall not be commenced until the claim of the plaintiff has been duly presented to such executor or administrator, and by him disallowed." Hill's Laws, sec. 378.

Utah. — Same as California. Comp. Laws, sec. 4130.

Washington. — Same as Montana. Code Proc., sec. 986.

Wyoming. — Same as California. Laws 1890-91, pp. 271, 272, sec. 9.

This section applies to pledges of personal property: *In re Kibbe*, 57 Cal. 407.

A vendor has a lien on the real estate sold to deceased, in the hands of his administrator, for the unpaid purchase-money: *Cahoon v. Robinson*, 6 Cal. 225.

A pledgee need not present a claim to the administrator of the pledgor, unless he seeks recourse against other property of the estate than that pledged: *In re Kibbe*, 57 Cal. 407.

Sections 1475 (§ 137, *ante*) and 1500 (§ 154, *supra*) of the Code of Civil Procedure must be construed so as to give effect to both sections, which can be done by limiting the latter to mortgages and liens upon other property than the homestead. Such encumbrances upon the homestead are by the former section specially required to be presented for allowance against the estate: *Camp v. Grider*, 62 Cal. 20.

After the death of a married woman, a claim arising on a mortgage of her separate property, executed by her to secure the note of her husband, is not required to be presented to her personal representatives: *Hibernia Sav. and Loan Soc. v. Conlin*, 67 Cal. 178.

Waiver of recourse against all property of estate mentioned in the above section, effect of: *Bull v. Coe*, 77 Cal. 54.

For decisions under the above section prior to March 15, 1876, see *Pitte v. Shipley*, 46 Cal. 154, where they are cited; see also *Harp v. Calahan*, 46 Cal. 230; *Hibernia Sav. & Loan Soc. v. Hayes*, 56 Cal. 297.

The holder of a claim against an estate which is secured by mortgage may proceed at once to foreclose his mortgage, even though it has been allowed as a claim against the estate: *Willis v. Farley*, 24 Cal. 490; *Moran v. Gardemeyer*, 82 Cal. 96.

A court, in foreclosing a lien against property of a decedent, cannot

enter a judgment for any deficiency after the property upon which the lien exists is exhausted: *Pechaud v. Rinquet*, 21 Cal. 76.

Claims secured by liens on homestead must be presented: See § 137, *ante*. See a discussion of the above section and section 1493 of the California Code of Civil Procedure (§ 146, *ante*), and their amendments, in *Hibernia Sav. & Loan Soc. v. Hayes*, 56 Cal. 297, where it is decided that those sections are not retroactive.

Since the amendment of the above section in 1876, it is not necessary to present a claim secured by mortgage to an administrator for allowance or rejection, when all recourse against the property of the estate, other than that mortgaged, is waived, and therefore such presentation need not be alleged in an action to foreclose the mortgage: *Security Sav. Bank v. Connell*, 65 Cal. 574.

In an action upon a claim, the complaint need not state that it has been presented to the administrator for allowance: *Toulouse v. Burkett*, Sup. Ct. Idaho, Feb. 15, 1886.

Montana. — **Presentment of a claim to the administrator of an estate is a prerequisite to the commencement of an action upon it:** *Dodson v. Neritt*, 5 Mont. 518.

The settlement and distribution of the estate is no bar to the right to foreclose a mortgage against the distributees of the mortgaged land, or the grantee of such distributees: *Dreyfuss v. Giles*, 79 Cal. 409.

An action may be maintained to foreclose a mortgage against the estate of a decedent, although at the time the action was commenced the time for the presentation of claims had expired, and no claim founded on the mortgage indebtedness had ever been presented: *Anglo-Nevada Assur. Corp. v. Nadeau*, 90 Cal. 393.

It is not essential to a waiver that the claim of the right waived should be enforceable, but there may

be a waiver or relinquishment of a claim to something without right: *Anglo-Nevada Assur. Corp. v. Nadeau*, 90 Cal. 393.

The allowance of a mortgage against an estate by the administratrix, and its approval by the judge, are not conclusive upon the heir; but he may show, in an action of foreclosure, either that the debt to secure which the mortgage was given had been paid, or that payments thereon had been made and not credited prior to the allowance of the mortgage: *Wise v. Williams*, 88 Cal. 30.

A mortgagor cannot, by resorting to an action of foreclosure, deprive an heir of the mortgaged property of the right to show that the mortgage was improperly allowed in the administration proceedings: *Wise v. Williams*, 88 Cal. 30.

In foreclosing a mortgage not presented to the administrator of a deceased mortgagor, in order that the plaintiff may avail himself of the provisions of this section, there must be an express waiver in the complaint of all recourse against the estate for deficiency; and a judgment foreclosing the mortgage without a judgment for deficiency, and without allowance for counsel fees, cannot be supported, where the complaint mistakenly alleges a presentation of the mortgage to the administrator, and does not contain an express waiver of claim for deficiency against other property of the estate: *Bank v. Charles*, 86 Cal. 322. In such a case, the judgment of foreclosure will be reversed for want of a proper pleading to support it; but the plaintiff will be allowed leave to amend his complaint so as to allege an express waiver of recourse against all other property of the estate than the mortgaged premises, and of all claim for allowance of counsel fees: *Bank v. Charles*, 86 Cal. 322.

If a trust fund has become so mingled in the mutations of business with and absorbed into the property belonging to the trustee, as to be no longer capable of being traced or identified, the only remedy of the *cestui que trust* upon the death of the trustee is that of a creditor, and if he fails to present his claim as required by probate law, he must fail in his action; but if the trust property can still be

ear-marked, traced, and identified, the *cestui que trust* may maintain an action against the administrator to enforce the trust without presenting any claim against the estate of the trustee, since the *cestui que trust* in such case seeks his own property only, and not to enforce a claim against the estate and property of the decedent: *Roach v. Caraffa*, 85 Cal. 436.

Presentment of mortgaged claim not necessary prerequisite to the commencement of an action thereon, provided the plaintiff waive any claim against the estate for any residue after the mortgaged premises is exhausted: *Rickards v. Hutchinson*, 18 Nev. 215; *Dreyfuss v. Giles*, 79 Cal. 409; *Anglo-Nevada Assur. Corp. v. Nadeau*, 90 Cal. 393.

No action can be maintained on a claim when there has been no legal presentment of such claim within the time prescribed: *Zachary v. Chambers*, 1 Or. 321.

Failure to present a claim against a decedent's estate secured by mortgage on his land within one year after publication of notice to creditors will not bar the mortgagee's rights under the mortgage as to the lands mortgaged, but will only operate to prevent his making any deficiency that remains after exhausting the mortgaged property out of the decedent's other estate: *Scammon v. Ward*, 1 Wash. 179.

Where the mortgage of a decedent's lands applies to the probate court, under the code of Washington Territory, section 1523, to compel the redemption of land from his mortgage lien, or to have the lands sold under section 1524, and the proceeds applied upon the mortgage debt, he must apply within the year allowed for the presentation of claims against the estate: *Scammon v. Ward*, 1 Wash. 179.

The failure to present a claim secured by mortgage upon a decedent's land to the administrator of the estate within one year after notice of his appointment will not prevent a foreclosure of the mortgage, where no recovery is sought beyond the proceeds of the mortgaged lands: *Reed v. Miller*, 1 Wash. 426.

In a suit for foreclosure of a mortgage on real estate, where the

mortgagor dies pending the suit, it is not necessary, in order to recover costs and attorney's fees, that the claim should have been presented to the administrator of the mortgagor's estate within one year after his appointment: *Reed v. Miller*, 1 Wash. 426.

§ 155. [1501.] Limitation.—The time during which there shall be a vacancy in the administration must not be included in any limitations herein prescribed.

Arizona.—Same. Rev. Stats., sec. 1118.

Idaho.—Same. Rev. Stats., sec. 5471.

Montana.—Same. Comp. Stats., p. 313, sec. 158.

Nevada.—Same. Gen. Stats., sec. 2806.

Utah.—Same. Comp. Laws, sec. 4131.

Washington.—Same. Code Proc., sec. 987.

Wyoming.—Same. Laws 1890-91, p. 272, sec. 10.

If there is a vacancy in the office of executor of an estate at the time an action is brought, and judgment is rendered therein against the estate, the heirs are not bound by such judgment: *Luco v. Com. Bank*, 70 Cal. 339.

§ 156. [1502.] Claims in Action Pending at Time of Decease.—If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator, for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required.

Arizona.—Same. Rev. Stats., sec. 1119.

Idaho.—Same. Rev. Stats., sec. 5472.

Montana.—Same. Comp. Stats., p. 313, sec. 159.

Nevada.—Same. Gen. Stats., sec. 2807.

Utah.—Same. Comp. Laws, sec. 4132.

Washington.—Same. Code Proc., sec. 988.

Wyoming.—Same. Laws 1890-91, p. 272, sec. 11.

See note to § 158, *post*.

If action is pending against decedent at time of death, the plaintiff must present his claim, and no recovery can be had unless proof be made of the presentation, which fact must be proven, although not denied in the answer, and no judgment for the plaintiff can be properly rendered upon the pleadings: *Derby & Co. v. Jackman*, 89 Cal. 1.

Where a verdict was had in decedent's lifetime against him, but

no judgment was given thereon till after his death, the executors were substituted for decedent, and final judgment was given against them, to be paid in due course of administration, which was affirmed on appeal. No claim was presented. It was held that objection to want of presentation comes too late after final judgment: *In re Page*, Myr. Prob. 61; affirmed 50 Cal. 40.

§ 157. [1503.] Allowance of Claim in Part.—Whenever any claim is presented to an executor or administrator, or to a judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor brought against the executor or administrator, unless he recover a greater amount than that offered to be allowed.

Arizona.—Same. Rev. Stats., sec. 1120.

Idaho.—Same. Rev. Stats., sec. 5473.

Montana.—Same. Comp. Stats., p. 313, sec. 160.

Nevada.—Same. Gen. Stats., secs. 2808.

Utah.—Same. Comp. Laws, sec. 4133.

Washington.—Same. Code Proc., sec. 989.

Wyoming.—Same, except that the words "or to a judge" are omitted. Laws 1890-91, p. 272, sec. 12.

Suit may be brought upon an allowed claim, but plaintiff cannot recover costs if he recovers no more than the administrator was willing to allow: *Corbett v. Rice*, 2 Nev. 330.

If decedent was the sole devisee of an estate which he received on distribution, subject to a parol trust to pay out of the estate a certain sum to the plaintiff, and that a claim against the estate of the decedent was presented by the plaintiff and allowed in part by the executors of the estate, and approved by the judge, a bill in equity will lie against the executors to enforce the trust against the estate as to the remainder of the

claim, it further appearing that the claim to the balance was not waived, and that the claim was not stale nor barred by the statute of limitations: *Walkert v. Bacon*, 85 Cal. 137.

Such action cannot be maintained without a demand upon the executors; and the plaintiff cannot be concluded by their allowance of part of the trust fund claimed, if not accepted in satisfaction of the demand; though the executors might have refused to allow any portion of it, on the ground that it was to be established in equity, if at all: *Walkert v. Bacon*, 85 Cal. 137.

§ 158. [1504.] Effect of Judgment against Executor.—A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the original docket of the judgment must be filed among the papers of the estate in court. No execution must issue upon

such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment.

Arizona. — Same, except that the words "original docket of the" are omitted. Rev. Stats., sec. 1121.

Idaho. — Same as Arizona. Rev. Stats., sec. 5474.

Montana. — Same as Arizona. Comp. Stats., p. 313, sec. 161.

Nevada. — Same as Arizona. Gen. Stats., sec. 2809.

Oregon. — "The effect of a judgment or decree against an executor or administrator on account of a claim against the estate of his testator or intestate is only to establish the claim, as if it had been allowed by him, so as to require it to be satisfied in due course of administration, unless it appear that the complaint alleged assets in his hands applicable to the satisfaction of such claim, and that such allegation was admitted or found to be true, in which case the judgment or decree may be enforced against such executor or administrator personally." Hill's Laws, sec. 1135.

Utah. — Same as California. Comp. Laws, sec. 4134.

Washington. — Same as Arizona. Code Proc., sec. 990.

"When a judgment is given against an executor or administrator for want of answer, such judgment is not to be deemed evidence of assets in his hands, unless it appear that the complaint alleged assets, and that the notice was served upon him. Code Proc., sec. 706.

Wyoming. — Same as California. Laws 1890-91, p. 272, sec. 13.

A judgment against an administrator, in an action upon a claim against the estate, merely has the effect of a claim duly allowed to be paid in due course of administration, and does not give the creditor any further rights, or determine the right of priority over other claims which must be determined by the probate court when the assets are finally marshaled and the order of payment determined by that court: *McLean v. Crow*, 88 Cal. 644.

Upon the substitution of the executrix of the defendant as defendant in an action to recover money, which after trial resulted in a judgment for the plaintiff, the judgment should be made payable in due course of administration, and not otherwise; but an erroneous judgment against the executrix absolutely may be modified upon appeal so as to make it so payable: *Preston v. Knapp*, 85 Cal. 559.

§ 159. [1505.] **Executions.** — When any judgment has been rendered for or against the testator (or) intestate in his lifetime, no execution shall issue thereon after his death, except as provided in section six hundred and eighty-six. A judgment against the decedent for the recovery of money must be presented to the executor or administrator, like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account

to the executor or administrator for any surplus in his hands. A judgment creditor, having a judgment, which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living.

Arizona. — Same. Rev. Stats., sec. 1122.

Idaho. — Same. Rev. Stats., sec. 5475.

Montana. — Same. Comp. Stats., p. 314, sec. 162.

Nevada. — Same, to the word "except," then as follows: "But a certified copy of such judgment shall be presented to the executor or administrator, and be allowed and filed, or rejected, as any other claim, but need not be supported by the affidavit of the claimant; and if justly due and unsatisfied, shall be paid in due course of administration; *provided, however,* that if the execution shall have been actually levied upon any property of the deceased, the same may be sold for the satisfaction thereof, and the officer making the sale shall account to the executor or administrator for any surplus in his hands. The executor or administrator may, however, require the affidavit of the claimant or other satisfactory proof that the judgment or any portion thereof is justly due and unsatisfied." Gen. Stats., sec. 2810.

Oregon. — "A claim established by judgment or decree against the deceased in his lifetime need not be verified by affidavit, but it is sufficient to present a certified copy of the judgment docket thereof to the executor or administrator for allowance or rejection, as in other cases; but this section is not to be construed to prevent an execution from being issued upon such judgment or decree, as elsewhere provided in this code." Hill's Laws, sec. 1136.

Utah. — Same as California. Comp. Laws, sec. 4135.

Washington. — "When any judgment has been rendered against the testator or intestate in his lifetime, no execution shall issue thereon after his death, but it shall be presented to the executor or administrator as any other claim, but need not be supported by the affidavit of the claimant, and if justly due and unsatisfied, shall be paid in due course of administration; *provided, however,* that if it be a lien upon any property of the deceased, the same may be sold for the satisfaction thereof, and the officer making the sale shall account to the executor or administrator for any surplus in his hands." Code Proc., sec. 991.

Wyoming. — Same as California, except that in lieu of the last clause of the first sentence, the following is substituted: "Unless the judgment be for the recovery of real or personal property or the enforcement of a lien thereon," and the last sentence is omitted. Laws 1890-91, p. 272, sec. 14.

See § 156, *ante*.

A party against whom a money judgment had been rendered moved for a new trial, and died before the motion was determined. His executrix was substituted as defendant, and prosecuted the motion and obtained an order

modifying the judgment, but no new judgment was entered. It was held that such modified judgment should be paid in due course of administration, and need not be presented to the executrix: *Brennan v. Brennan*, 65 Cal. 517.

A judgment against an executor or administrator should be in the form given by the above section. *Rice v. Innskeep*, 34 Cal. 226; *Racouillat v. Sansevain*, 32 Cal. 396; *Myers v. Mott*, 29 Cal. 363; though a variance in this respect may not be fatal: *Chase v. Swain*, 9 Cal. 130.

The court may amend the record when it appears therefrom that a clerical error has been made: *In re Schroeder*, 46 Cal. 304.

Judgment against executor or administrator is no better than an approval of claim: *Wells, Fargo, & Co. v. Robinson*, 13 Cal. 134.

Judgment by default may be taken against an administrator: *Chase v. Swain*, 9 Cal. 137.

Execution cannot be issued to enforce the judgment: *Rice v. Innskeep*, 34 Cal. 226.

Property attached during the lifetime of decedent cannot be sold after his death to satisfy the judgment: *Myers v. Mott*, 29 Cal. 359; *Ham v. Cunningham*, 50 Cal. 365; *Ham v. Henderson*, 50 Cal. 367. See next section.

If, pending an action against several obligors, one of them dies, his

executor may be substituted, but there must be a judgment against him, payable *de bonis testatoris* in the due course of administration. The judgment against the others may be in the usual form: *Bank of Stockton v. Howland*, 42 Cal. 131; *Kelly v. Bandini*, 50 Cal. 530.

A decree of a court of equity settling the account of a deceased executor who had made no accounting with the estate he represented is to be regarded as a decree of the probate court settling the account and directing payment: *Chaquette v. Ortet*, 60 Cal. 594.

The provisions of the above section requiring a copy of the judgment to be filed among the papers of the estate do not apply to the judgment of a court of equity settling the account of an administrator who had died without making an accounting: *Chaquette v. Ortet*, 60 Cal. 594.

The holder of a judgment against the deceased is not required to present his claim to the executor or administrator: *Knott v. Shaw*, 5 Or. 482.

Property vested in a non-resident administrator is liable to attachment and other process: *Barlow v. Cogan*, 1 Wash. Ter. 257.

§ 160. [1506.] What Judgment is not a Lien.—A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration.

Arizona.—Same. Rev. Stats., sec. 1123.

Idaho.—Same. Rev. Stats., sec. 5476.

Montana.—Same. Comp. Stats., p. 314, sec. 163.

Utah.—Same. Comp. Laws, sec. 4136.

Wyoming.—Same. Laws 1890-91, p. 272, 273, sec. 3.

§ 161. [1507.] Doubtful Claims.—If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy to some disinterested person, to be approved by the superior court, or a judge thereof. Upon filing the agreement and approval of such court or judge, in the office of the clerk of the court for the county in which the letters testamentary or of administration were

granted, the clerk must enter a minute of the order referring the matter in controversy to the person so selected, or, if the parties consent, a reference may be had in the court; and the report of the referee, if confirmed, establishes or rejects the claim the same as if it had been allowed or rejected by the executor or administrator and judge.

Arizona. — Same. Rev. Stats., sec. 1124.

Idaho. — Same. Rev. Stats., sec. 5477.

Montana. — Same. Comp. Stats., p. 314, sec. 164.

Nevada. — Same. Gen. Stats., sec. 2811.

Oregon. — First sentence of section same. Second sentence as follows: "Upon the filing of such agreement, such court or judge shall make the order accordingly." Hill's Laws, sec. 1137.

Utah. — Same. Comp. Laws, sec. 4137.

Washington. — First sentence same, except that after the word "person" is added "or persons." Remainder of section as follows: "Upon filing the agreement in the court, the court shall enter an order referring the matter in controversy to the persons so selected." Code Proc., sec. 992.

Wyoming. — Same as California; last two words omitted. Laws 1890-91, p. 273, sec. 16.

A reference of a claim against the estate of a decedent is sufficient, under the above section, if made in court on the consent of parties: *Hall v. Superior Court*, 69 Cal. 79.

§ 162. [1508.] Trial by Referee. — The referee must hear and determine the matter, and make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation, and subject to the same control, as in other cases of reference. The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators, and the judgment of the court thereon shall be as valid and effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process.

Arizona. — Same. Rev. Stats., sec. 1125.

Idaho. — Same. Rev. Stats., sec. 5478.

Montana. — Same. Comp. Stats., p. 314, sec. 165.

Nevada. — Same. Gen. Stats., sec. 2812.

Oregon. — Same. Hill's Laws, sec. 1138.

Utah. — Same. Comp. Laws, sec. 4138.

Washington. — "The referee or referees, having been sworn, shall proceed

to hear and determine the case, and make return thereof; and their award, if not excepted to, shall be entered as the decision of the court. If exceptions in writing are filed, the court shall proceed to determine the case in like manner as other claims are determined. The compensation of referees shall be the same as allowed to referees in other causes." Code Proc., sec. 993.

Wyoming. — Same as California. Laws 1890-91, p. 273, sec. 17.

§ 163. [1509.] Liability of Executor. — When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause.

Arizona. — Same. Rev. Stats., sec. 1126.

Idaho. — Same. Rev. Stats., sec. 5479.

Montana. — Same. Comp. Stats., p. 315, sec. 166.

Nevada. — Same. Gen. Stats., sec. 2813.

Utah. — Same. Comp. Laws, sec. 4139.

Wyoming. — Same. Laws 1890-91, p. 273, sec. 18.

This provision is intended to prevent unnecessary litigation: *Hickox v. check executors* and prevent them *Graham*, 6 Cal. 169.

§ 164. [1510.] Claims of Executor. — If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavit, must be presented for allowance or rejection to a judge of the superior court, and its allowance by the judge is sufficient evidence of its correctness, and must be paid as other claims in due course of administration. If, however, the judge reject the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney, at the expense of the estate, to defend the action. If the claimant recovers no judgment, he must pay all costs, including defendant's reasonable attorney's fees, to be fixed by the court.

Arizona. — Same. Rev. Stats., sec. 1127.

Idaho. — Same. Rev. Stats., sec. 5480.

Montana. — Same. Comp. Stats., p. 315, sec. 167.

Nevada. — Same, to and including the word "correctness"; balance omitted. Gen. Stats., sec. 2814.

Oregon. — Same as California, to and including the word "rejection"; then as follows: "But the allowance of such claim by such court or judge does not conclude a creditor, heir, or other person interested in the estate, in any action,

suit, or proceeding between such executor or administrator and such creditor, heir, or other person." Hill's Laws, sec. 1139.

"If the court, or judge thereof, reject the claim of the executor or administrator, either in whole or in part, or in case the same is not presented for allowance as provided in the last section, the executor or administrator may retain the amount thereof until the final settlement of his accounts, when, if the same is controverted or objected to by any person interested in the estate, the right of the executor or administrator to have the allowance claimed shall be tried and determined by the court." Hill's Laws, sec. 1140.

Utah. — Same as California. Comp. Laws, sec. 4140.

Washington. — Same as Nevada. Code Proc., sec. 994

Wyoming. — Same as California, except title of court. Laws 1890-91, p. 273, sec. 19.

A claim due to an executor must be presented to the judge for allowance, as required by above section, within the time allowed by law for the presentation of claims, or it cannot be allowed in the executor's accounts: *In re Hildebrandt*, 92 Cal. 433.

A claim due to an executor of an estate must be presented, duly authenticated, with affidavits, to the judge for allowance within the time specified in the notice to the creditors, or it will be barred: *In re Taylor*, 16 Cal. 434.

An executor or administrator holding a debt against the estate of the deceased cannot pay himself and claim a credit, when he has never presented his claim for allowance to the judge: *In re Taylor*, 16 Cal. 434.

The difference between the claims of an executor or administrator and those of other creditors, as to their presentation, is, that the former must be presented to the judge only, and the latter

must be presented to the executor or administrator and the judge: *In re Taylor*, 16 Cal. 434.

Where administrator is personally interested in a claim against the estate of his decedent, he is disqualified from acting thereon: *In re Hill*, 67 Cal. 238.

A judgment obtained by an administrator is a debt at law due him personally, on which he can sue in a foreign state as an individual: *Lewis v. Adams*, 70 Cal. 403.

Claim of executor, even though it has been allowed by his co-executor, must be presented to the judge within the period fixed by the notice to creditors: *In re Keenan*, Myr. Prob. 186.

It is no valid objection to the allowance by the county court of a claim held by an administrator that such administrator has not filed his undertaking as administrator of the partnership estate: *In re Houck*, Sup. Ct. Or., Feb. 29, 1888.

§ 165. [1511.] Executor Neglecting to Give Notice.—If an executor or administrator neglects for two months after his appointment to give notice to creditors, as prescribed by this chapter, the court must revoke his letters, and appoint some other person in his stead, equally, or the next in order, entitled to the appointment.

Arizona. — Same. Rev. Stats., sec. 1128.

Idaho. — Same. Rev. Stats., sec. 5481.

Montana. — Same. Comp. Stats., p. 315, sec. 168.

Nevada. — Same, to the words "and appoint"; balance omitted. Gen. Stats., sec. 2815.

Utah. — Same as California. Comp. Laws, sec. 4141.

Washington. — Same as Nevada. Code Proc., sec. 995.

§ 166. [1512.] Executor to Return Statement of Claims. — At the same time at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court, or a judge thereof, and from time to time thereafter he must present a statement of claims subsequently presented to him, if so required by the court, or a judge thereof. In all such statements he must designate the names of the creditors, the nature of each claim, when it became due or will become due, and whether it was allowed or rejected by him.

Arizona. — Same. Rev. Stats., sec. 1129.

Idaho. — Same. Rev. Stats., sec. 5482.

Montana. — Same. Comp. Stats., p. 315, sec. 169.

Nevada. — Same. Gen. Stats., sec. 2816.

Utah. — Same. Comp. Laws, sec. 4142.

Washington. — Same. Code Proc., sec. 996.

Wyoming. — “At the same time at which he is required to return his inventory and appraisement, the executor must also accompany the same with a statement of all claims against the estate which have been presented to him or are within his actual knowledge, and six months from the date of his letters he must file a statement of all claims submitted to him for allowance, and one year from the date of said letters he must then file a statement of all additional claims presented. In all statements he must designate the names of the creditors, the date when the claim is presented, the nature of each claim, when it became due or will become due, and whether it was allowed or rejected by him.” Laws 1890-91, p. 273, 274, sec. 20.

§ 167. [1513.] Interest-bearing Claims. — If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid. This section does not apply to existing debts, unless the creditor consent to accept the amount.

Arizona. — Same. Rev. Stats., sec. 1130.

Idaho. — Same. Rev. Stats., sec. 5483.

Montana. — Same. Comp. Stats., p. 315, sec. 170.

Utah. — Same. Comp. Laws, sec. 4143.

Wyoming. — Same, except that in the last sentence "debts not due" is inserted in place of "existing debts." Laws 1890-91, p. 274, sec. 21.

A claim duly allowed and approved bears interest from the date of its approval by the judge: *In re Glenn*, 74 Cal. 567.

Compound interest on mortgage claim cannot be paid by exec-

utor when: *In re Titcomb*, Myr. Prob. 55.

Interest on a claim is waived by a stipulation indorsed thereon, foregoing any demand beyond a sum named: *In re Bleakley*, Myr. Prob. 235.

CHAPTER VII.

OF SALES AND CONVEYANCES OF PROPERTY OF DECEDENTS.

ARTICLE I. SALES IN GENERAL.

II. SALES OF PERSONAL PROPERTY.

III. SUMMARY SALES OF MINES AND MINING INTERESTS.

IV. SALES OF REAL ESTATE, INTERESTS THEREIN, AND CONFIRMATION THEREOF.

V. MORTGAGES AND LEASES.

ARTICLE I.

SALES IN GENERAL.

§ 168. Estate, how chargeable.

§ 169. No sales valid, except by order of court.

§ 170. Applications for orders of sale.

§ 171. One petition, order, and sale.

§ 168. [1516.] Estate, how Chargeable.—All the property of a decedent shall be chargeable with the payment of the debts of the deceased, the expenses of administration, and the allowance to the family, except as otherwise provided in this code and in the Civil Code. And the said property, personal and real, may be sold as the court may direct, in the manner prescribed in this chapter. There shall be no priority as between personal and real property for the above purposes.

Arizona.—Same. Rev. Stats., sec. 1131.

Idaho.—“When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in this code.” Rev. Stats., sec. 5751.

“The personal estate of the decedent which comes into the hands of the executor or administrator is first chargeable with the payment of the debts and expenses; if the goods, chattels, rights, and credits in the hands of the executor or administrator are not sufficient to pay the debts of the decedent, the expenses of administration, and the allowance to the family, the whole of the real estate may be sold for that purpose by the executor or administrator.” Rev. Stats., sec. 5490.

Montana.—Same as California. Comp. Stats., p. 318, sec. 171.

Nevada.—Same as Idaho, Rev. Stats., sec. 5490, *supra*. Gen. Stats., sec. 2784.

Oregon. — "When the proceeds of the sale of personal property have been exhausted, and the charges, expenses, and claims specified in section 1142 [§ 173, *post*] have not all been satisfied, the executor or administrator shall sell the real property of the estate, or so much thereof as may be necessary for that purpose. If any of such real property have been specially devised, it shall be exempt from the operation of the order of sale in the same manner as personal property specially bequeathed." Hill's Laws, sec. 1145.

Utah. — Same as California, except that "act" is substituted for "code and in the Civil Code." Comp. Laws, sec. 4144.

Washington. — Same as Idaho, Rev. Stats., sec. 5490, *supra*. Code Proc., sec. 966.

"If intestate leave no widow or minor children, all his estate shall be assets in the hands of the administrator, after payment of funeral expenses and expenses of administration, for the payment of the debts of the deceased." Code Proc., sec. 976.

Wyoming. — Same as California. Laws 1890-91, p. 274, sec. 1.

In sale of property, real and personal property are charged alike for payment of debts; there is no priority: *In re Montgomery*, 60 Cal. 645. See § 175, *post*.

Where testator indicated no preference for any class of devisees, the real and personal estate devised must contribute equally: *In re Woodworth*, 31 Cal. 596. See § 207, *post*.

This rule was formerly otherwise: *In re Woodworth*, 31 Cal. 605; *In re Moulton*, 48 Cal. 193.

Real estate of deceased parties is assets in the hands of the administrator in California, to be administered upon like personalty: *Meeks v. Vassault*, 3 Saw. 206.

Oregon. — Nothing is assets in the hands of the administrator for payment of debts except money: *United States v. Eggleston*, 4 Saw. 199.

Property Chargeable with the payment of debts: See § 444, *post*.

Certain Claims Preferred: See § 445, 204-208, *post*.

§ 169. [1517.] **No Sales Valid Except by Order of Court.** — No sale of any property of an estate of a decedent is valid unless made under order of the superior court, except as otherwise provided in this chapter. All sales must be under oath, reported to and confirmed by the court, before the title to the property sold passes.

Arizona. — Same. Rev. Stats., sec. 1132.

Idaho. — Same. Rev. Stats., sec. 5491.

Montana. — Same. Comp. Stats., p. 318, sec. 173.

Nevada. — Same; last sentence omitted. Gen. Stats., sec. 2817.

Oregon. — Same as Nevada. See Hill's Laws, sec. 1141.

Utah. — Same as Nevada. Comp. Laws, sec. 4145.

Washington. — "No sale of any property shall be valid unless made under order of the court, unless otherwise provided by will." Code Proc., sec. 998.

Wyoming. — Same as California, except that "superior" is omitted. Laws 1890-91, p. 274, sec. 2.

All sales of personal property, whether made at public or private sale, with or without an order of the probate court, shall be returned by the executor or administrator to said court for confirmation at the next regular term of said court after said rule shall have been made: *In re Radovich*, 74 Cal. 536.

Sales without Order of Court: See § 205, *post*.

An executor has no authority, without an order of court, to sell currency belonging to the estate for coin, and it rests in the discretion of the court to approve or disapprove the sale: *In re Sanderson*, 74 Cal. 199.

An act of the legislature authorizing an administrator to sell real property belonging to the estate of his decedent, except in satisfaction of the lien of creditors, or for the payment of family allowance, or the expenses of administration, is unconstitutional: *Brenhan v. Story*, 39 Cal. 179.

Sales under our probate system are judicial; the statute of frauds does not apply in such case, the sale being made by the court. The contract need not be in writing, etc.: *Halleck v. Guy*, 9 Cal. 181.

The provisions of the code declaring that no sale of any property of an estate shall be valid unless made upon an order of the court apply only to sales by executors and administrators. They have no reference to judicial sales under decrees of court, nor to sales in pursuance of testamentary authority: *Fallon v. Butler*, 21 Cal. 24; *Cowell v. Buckelew*, 14 Cal. 641; *Payne v. Payne*, 18 Cal. 292; *Norris v. Harris*, 15 Cal. 256.

A sale of personal property which has been confirmed by the court cannot be treated as invalid because the administrator took a note in part payment, when the balance was held by the court to be the full cash value of the property: *In re Kibbe*, 57 Cal. 407.

An order of sale or the proceedings under it cannot be collaterally attacked for defects, or on the ground of irregularity. A direct action must be brought to impeach them: *Halleck v. Morse*, 22 Cal. 266; *Irwin v. Scriber*, 18 Cal. 499.

An administrator has no authority to sell real estate except by an order of a properly constituted court, properly issued, with which he must strictly comply: *Broadwater v. Richards*, 4 Mont. 80.

A statute making valid all sales under orders of court where there have been "defects of form, or omissions, or errors," does not validate void sales. It only covers cases which have arisen in the exercise of jurisdiction already acquired: *Seavers v. Gerke*, 3 Saw. 353. See *Wright v. Edwards*, 10 Or. 301; *Gilman v. Taylor*, 5 Or. 89.

Where executor has sold personalty of an estate without an order of court, the court may subsequently ratify such sale: *Brewster v. Baxter*, 2 Wash. Ter. 135.

Sales where Property is Mortgaged: See § 213, *post*.

A Contract for the Purchase of Real Estate may be sold: See § 209, *post*.

Executor cannot Buy at or be interested in his own sale: See § 220, *post*.

§ 170. [1518.] Petitions for Orders of Sale.—All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and, upon the hearing, any person interested in the estate may file his written objections, which must be heard and determined. A failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale.

Arizona. — Same. Rev. Stats., sec. 1133.

Idaho. — Same. Rev. Stats., sec. 5492.

Montana. — Same. Comp. Stats., p. 318, sec. 174.

Nevada. — Same; last sentence omitted. Gen. Stats., sec. 2818.

Oregon. — "The application for an order of sale shall be by the petition of the executor or administrator." Hill's Laws, sec. 1141.

Utah. — Same as California. Comp. Laws, sec. 4146.

Washington. — Same as Nevada. Code Proc., sec. 999.

Wyoming. — Same as California. Laws 1890-91, p. 274, sec. 3.

See note to next section.

Opposition to sale of property of estate: See § 186, *post*. **est in real estate cannot contest an order of court directing it to be sold:**

One who does not claim any inter- *In re Schroeder*, 46 Cal. 304.

§ 171. [1519.] But One Petition, Order, and Sale.

— When it appears to the court that the estate is insolvent, or that it will require a sale of all the property of the estate, of every character, to pay the family allowance, expenses of administration, and debts, there need be but one petition filed, but one order of sale made, and but one sale had, except in the case of perishable property, which may be sold as provided in section fifteen hundred and twenty-two. The court, when a petition for the sale of any property for any of the purposes herein named is presented, must inquire fully into the probable amount required to make all such payments, and if there be no more estate than sufficient to pay the same, may require but one proceeding for the sale of the entire estate. In such case, the petition must set forth substantially the facts required by section fifteen hundred and thirty-seven.

Arizona. — Same. Rev. Stats., sec. 1134.

Idaho. — Same. Rev. Stats., sec. 5483.

Montana. — Same. Comp. Stats., p. 319, sec. 175.

Utah. — Same. Comp. Laws, sec. 4147.

Wyoming. — Same, except that in the first sentence the words "or judge in vacation or recess" are interpolated after the word "court," and in lieu of the words "section fifteen hundred and twenty-two" the words "the next succeeding section" are used. In the second sentence, after the word "court," the words "or judge" are interpolated. The last sentence is omitted. Laws 1890-91, p. 274, 275, sec. 4.

A statement in an order of sale of personal property, that it is perishable property, and liable to assessment and taxation, may be treated as surplusage, and does not vitiate the order nor af-

fect its character: *Halleck v. Morse*, 22 Cal. 266.

Proceedings for the sale of real property are special, and the jurisdiction depends upon the facts stated

in the petition. The petition is the commencement of the proceeding and the order is the judgment: *Prior v. Downey*, 50 Cal. 388; *Haynes v. Meeks*, 20 Cal. 312; *Gregory v. McPherson*, 13 Cal. 562; *Townsend v. Gordon*, 19 Cal. 188; *Gregory v. Taber*, 19 Cal. 397; *In re Spriggs*, 20 Cal. 121.

A petition which substantially complies with the directions of the statute when filed is sufficient to give the court jurisdiction in case of sales of real property: *Stuart v. Allen*, 16 Cal. 473; *Fitch v. Miller*, 20 Cal. 352; *Haynes v. Meeks*, 20 Cal. 288; *Prior v. Downey*, 50 Cal. 388; *In re Boland*, 55 Cal. 310; *Wilson v. Hastings*, 66 Cal. 243.

A general averment covering the matters required by law to be stated in the petition is not sufficient: *Haynes v. Meeks*, 20 Cal. 312.

The jurisdiction is based upon the averments of the petition, and not upon the proof of the facts stated therein: *Fitch v. Miller*, 20 Cal. 352.

The petition must state the facts required by law to be stated, and un-

less it does, the order and the sale will be void: *Gregory v. Taber*, 19 Cal. 397; *Gregory v. McPherson*, 13 Cal. 562; but defects in the petition by reason of the failure to state such facts, if such facts are supplied by the proofs at the hearing and are stated in the order of sale, will not invalidate the subsequent proceedings: *Dennis v. Winter*, 63 Cal. 16; and if such facts do not appear in the petition, and are not stated in the order of sale to have been proved at the hearing, *such order will be void for want of jurisdiction:* *In re Rose*, 63 Cal. 346.

Order of sale of realty is a judgment in a new, separate, and independent proceeding, depending for its validity upon the sufficiency of the facts alleged in the petition for the order: *Ethell v. Nichols*, 1 Idaho, 741.

The proceedings for the sale of real estate of an intestate are in the nature of an action, of which the presentation of a petition is the commencement and the order of sale is the judgment: *Broadwater v. Richards*, 4 Mont. 80.

ARTICLE II.

SALES OF PERSONAL PROPERTY.

§ 172. Perishable property to be sold.

§ 173. Order to sell personal property.

§ 174. Partnership interests and choses in action, how sold.

§ 175. Order of sale, what to be first sold.

§ 176. Sale of personal property.

§ 172. [1522.] Perishable Property to be Sold.—

At any time after receiving letters, the executor, administrator, or special administrator may apply to the court or judge and obtain an order to sell perishable and other personal property likely to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator, or special administrator is responsible for the property, unless, after making a sworn return, and on a proper showing, the court shall approve the sale.

Arizona. — Same. Rev. Stats., sec. 1135.

Idaho. — Same. Rev. Stats., sec. 5494.

Montana. — Same. Comp. Stats., p. 319, sec. 176.

Nevada. — Same, except that if there be delay in obtaining the order, the property may be sold without an order of sale, and the clause "the order for the sale may be made without notice" is omitted; also, "personal," before the words "property as," is omitted. Rev. Stats., sec. 2819.

Utah. — Same as Nevada. Comp. Laws, sec. 4148.

Washington. — "Within twenty days after the filing of the inventory, the executor or administrator shall apply for an order to sell the perishable property of the estate, and so much other property as may be necessary to be sold to pay the allowance made to the family of the deceased, and the order of sale may be made without notice of the application, but the executor or administrator shall be responsible for the value of the property, unless the sale be reported to and approved by the court." Code Proc., sec. 1000.

Wyoming. — Same as California. Laws 1890-91, p. 275, sec. 5.

Form No. 122.—Petition for Order to Sell Perishable Property.

[Caption, Form No. 1, subd. 5.]

1. That petitioner is the duly appointed, qualified, and acting administrator (or executor or special administrator) of the estate of —, deceased;

2. That the following property of said estate is of a perishable nature, to wit, four hundred crates of oranges, and it is to the best interest of said estate that the same should be sold;

3. That there is belonging to said estate seven hundred head of hogs, the keeping and care of which is very expensive, and it is to the best interest of said estate that they should be sold;—

Wherefore petitioner prays that an order be made herein authorizing him to sell said perishable property as provided by law, and that such other or further order may be made as is meet in the premises.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 123.—Order of Sale of Perishable Property.

[Title of Court and Estate.]

Now, on this — day of —, A. D. 18—, the petition of —, administrator of the estate of —, deceased, praying for an order to sell certain perishable property of said estate, coming on to be heard, and it appearing to the court that the property de-

scribed in said petition is of a perishable nature, likely to depreciate in value, and will incur loss and expense by being kept, —

It is therefore ordered that said personal property, which is hereinafter described, be sold at public auction for cash, gold coin; said property is described as follows, to wit (here insert description). —, Judge of the — Court.

Dated —, 18—.

§ 173. [1523.] Order to Sell Personal Property. — If claims against the estate have been allowed, and the sale of property is necessary for their payment, or for the expenses of administration, or for the payment of legacies, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application, from time to time, so long as any personal property remains in his hands, and sale thereof is necessary. If it appear for the best interests of the estate, he may, at any time after filing the inventory in like manner, and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, whether necessary to pay debts or not.

See §§ 305, 412, *post*.

Arizona. — Same. Rev. Stats., sec. 1136.

Idaho. — Same. Rev. Stats., sec. 5495.

Montana. — Same. Comp. Stats., p. 319, sec. 177.

Nevada. — Same, except that the phrases “or for the payment of legacies” and “whether necessary to pay debts or not” are omitted. Gen. Stats., sec. 2819.

Oregon. — “Upon the filing of the inventory, or at the next term of the court, the executor or administrator may make an application to sell the personal property of the estate for the purpose of paying the funeral charges, expenses of administration, the claims, if any, against the estate, and for the purposes of distribution; and it shall be the duty of the court or judge to grant such order, if in his judgment it is for the best interest of the estate, and to direct and prescribe the terms of sale upon which such property shall be sold, whether for cash or on credit.” Hill’s Laws, sec. 1142.

Utah. — Same as California. Comp. Laws, sec. 4149.

Washington. — “If the claims against the estate have been allowed, or a sale of property shall be necessary for the payment of the expenses of the

administration, he may also apply for an order to sell so much of the personal estate as shall be necessary." Code Proc., sec. 1001.

Wyoming. — Same as California, except that in the first sentence the words "to the court or judge" are interpolated after the words "may apply," and the second sentence is omitted. Laws 1890-91, p. 275, sec. 6.

An administrator cannot be charged with the value of property sold under an order of court without proving gross negligence, fraudulent concealment, or false suggestion on his part in obtaining the order of sale: *Richardson v. Sage*, 57 Cal. 212.

Form No. 124. — Petition for Order of Sale of Personal Property.

[Caption, Form No. 1, § 5, *ante*.]

1. That letters of administration (or testamentary) have heretofore been duly issued herein by this court to petitioner, and petitioner is now the duly qualified and acting administrator (or executor) of said estate;

2. That the following claims against said estate have been duly allowed and approved by said administrator (or executor) and the judge of this court, and are filed herein, viz. (here insert list of claims allowed);

3. That the expenses of administration which have been incurred herein are as follows (here insert list of said expenses);

4. That the amount of family allowance which is now due under the order of this court, heretofore made, to the widow and minor children of the decedent is the sum of — dollars, and the amount which will become due to them under said order up to the time of the final distribution of said estate will be about the sum of — dollars;

5. That the sum of — dollars is due to persons named in the will for legacies bequeathed to them in said will of decedent, and it is hereby referred to and made a part hereof;

6. That the commissions of the administrator (or executor), fees of counsel, and other expenses of administering upon said estate will amount to about the sum of — dollars;

7. That the total amount of claims due from said estate, costs and expenses of administration, family allowance, etc., amount to the sum of — dollars;

8. That the inventory and appraisement of the property of said estate has been duly filed herein, containing a description and the value of all the real and personal property of said es-

tate, and said inventory and appraisement is hereby referred to and made a part hereof;

9. That of said personal property there has been set apart for the use and benefit of the family of decedent the following (here insert list and description of property so set apart);

10. That of said personal property the following has been specifically bequeathed (here insert list and description of bequests);

11. That a sale of the remaining personalty of said estate will be sufficient to pay all the above-enumerated items (or 11. That a sale of the whole of said remaining personalty is necessary for the payment of said items);¹—

Wherefore your petitioner prays that an order of this court be made, directing that the whole or so much of said remaining personalty be sold at public auction² as shall be necessary for the payment of said debts, family allowance, costs and expenses of administration, etc.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 125.—Notice of Hearing of Petition to Sell Personal Property.

[Title of Court and Estate.]

Notice is hereby given that —, executor (administrator) of the estate of —, deceased, has applied to the — court of the — county of —, on the — day of —, A. D. 18—, for an order to sell certain personal property of said estate, and that his petition therefor has been set for hearing at ten o'clock, A. M., of said day.

—, Clerk.

Dated —

Form No. 126.—Opposition to Sale of Personal Property.

[Title of Court and Estate.]

—, the administrator of the estate of —, deceased, having on the — day of —, A. D. 18—, filed herein his petition praying for an order authorizing him to sell the personal property belonging to said estate, —

¹ With reference to this allegation, see § 175, *post*.

² See § 176, *post*.

Now comes —, and alleges that she is the widow of said —, deceased, and that said deceased also left surviving him one minor child of the age of eight years, named —;

That the following property mentioned in the inventory made and filed in said estate is exempt from execution, and under section 1465 of the Code of Civil Procedure of California ought to be set apart by this court for the use of the surviving wife of said deceased, and for which the undersigned, the widow of said deceased, has filed her petition herein, praying that the same may be so set apart, to wit, one oil-painting, one bedstead, one bureau, one commode, one wash-stand, one table, one wardrobe, one cigar-stand, one kitchen table, one ice-chest, fifteen yards carpet, one drop-light, one gold watch, one silver watch, five gold finger-rings and settings, three watch-chains (one gold, two silver), one locket, one pair sleeve-buttons, one gold pin, three pistols, two clocks, one guitar, lace curtains and cornices, one silver-plated water-pitcher, and two carving sets.

The undersigned objects to an order being made that said personal property above mentioned, or any part thereof, be sold, and objects to the same being sold for any purpose, on the ground and for the reason that the same ought to be set apart for the use of the widow of deceased, and she asks that the same be so set apart.

—, Widow of said Deceased.

—, Attorney for Widow.

§ 174. [1524.] Partnership Interests and Choses in Action, how Sold.—Partnership interests, or interests belonging to any estate by virtue of any partnership formerly existing, interest in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court.

Arizona. — Same. Rev. Stats., sec. 1137.

Idaho. — Same. Rev. Stats., sec. 5496.

Montana. — Same. Comp. Stats., p. 319, sec. 178.

Utah. — Same. Comp. Laws, sec. 4150.

Wyoming. — Same, except there are added the words "or before the judge in vacation time." Laws 1890-91, p. 275, sec. 7.

§ 175. [1525.] What Property to be Sold First—

If it appear that a sale is necessary for the payment of debts or the family allowance, or for the best interest of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold, and the court or judge must so direct.

Arizona. — Same. Rev. Stats., sec. 1138.

Idaho. — Same. Rev. Stats., sec. 5497.

Montana. — Same. Comp. Stats., p. 320, sec. 179.

Nevada. — Same. Gen. Stats., sec. 2820.

Oregon. — See Hill's Laws, secs. 1142, 1144, under § 173, *ante*.

Utah. — Same. Comp. Laws, sec. 4151.

Washington. — Same as last sentence of California. Code Proc., sec. 1002. See Code Proc., sec. 1001, under last section.

Executor or administrator may sell or dispose of choses in action by indorsement to a distributee, or to a stranger, without an order of the court of probate: *Weider v. Osborn*, 20 Or. 307.

Form No. 127. — Order of Sale of Personal Property.

[Title of Court and Estate.]

Application having been made to this court by a petition in writing of —, administrator of the estate of —, deceased, filed in this court on the — day of —, A. D. 18—, for an order to sell at public or private sale all the personal property of said estate, or so much thereof as may be necessary to pay the family allowance, costs, and expenses of administration, and debts due from the estate; and such petition having by an order of court been duly set for hearing on the — day of —, A. D. 18—, at the hour of — o'clock, A. M., of said day, and due notice of said hearing having been duly given to all persons interested in said estate, and now, on said day, said matter coming on regularly for hearing, and it appearing that there is due upon the family allowance the sum of about \$—; that

the costs and expenses of administration amount to about \$—; that the following claims have been duly presented, allowed, and filed, to wit, California State Bank, for \$—, for \$—, etc.; that a sale of the whole of said personal property is necessary, in order that the proceeds may be applied to the payment of said claims, family allowance, and expenses of administration (or that it is for the best interest of the estate and of the persons interested in said personal property that the same be sold);—

It is therefore ordered, adjudged, and decreed that said personal property of said estate be sold by said administrator at public auction; said property is described as follows, to wit (here insert description). —, Judge of the — Court.

Dated —, 18—.

§ 176. [1526.] Personal Property, how Sold.—The sale of personal property must be made at public auction, for such money or currency as the court may direct, and after public notice given for at least ten days, by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale, and a brief description of the property to be sold, unless for good reasons shown the court or a judge thereof orders a private sale or a shorter notice. Public sales of such property must be made at the court-house door, or at the residence of the decedent, or at some other public place, but no sale shall be made of any personal property which is not present at the time of sale, unless the court otherwise order.

Arizona.—Same. Rev. Stats., sec. 1139.

Idaho.—First sentence of section same, except that the words “for such money or currency as the court may direct” are omitted. Second sentence as follows: “Public sales shall not be made of any property which is not present at the time of selling it, unless the court otherwise order.” Rev. Stats., sec. 5498.

Montana.—Same as California. Comp. Stats., p. 320, sec. 180.

Nevada.—Same as California, except that the following clauses and phrases are omitted: “For such money or currency as the court may direct”; “and a brief description of the property to be sold”; “unless the court otherwise order.” Gen. Stats., secs. 2821, 2822.

Oregon.—See Hill’s Laws, sec. 1144, under § 173, *ante*.

"Thereafter the executor or administrator shall sell such personal property from time to time for the purposes specified in the last section, and as often and as much thereof as may be necessary. Such sale shall be conducted in the same manner as a sale of personal property on execution, unless otherwise provided in this title." Hill's Laws, sec. 1143.

Utah. — Same as California. Comp. Laws, sec. 4152.

Washington. — "Sales of personal property shall be made at public auction, and after notice given for at least two weeks, which notice shall be given by notices posted in ten public places in the county, or by publication in a newspaper, if the judge shall so order, in which shall be stated the time and place of sale." Code Proc., sec. 1003.

"If it be made to appear to the satisfaction of the court that it will be for the interest of the estate to allow the executor or administrator to sell some or the whole of the personal estate at private sale, the court may so order." — Code Proc., sec. 1004.

Wyoming. — Same as California, except that the clause "for such moneys or currency as the court may direct" is omitted from the first sentence. Laws 1890-91, p. 266, sec. 8.

Notice of a sale of personal property of an estate must be by posting in three public places. If it is published in a newspaper and not posted, the sale will be void, unless the court by its order authorized the notice to be served by publication: *Halleck v. Morse*, 17 Cal. 340.

A sale of the personal property of an estate upon insufficient notice is

voidable, if not void: *Haynes v. Meeks*, 10 Cal. 118; *Halleck v. Morse*, 17 Cal. 340.

Power of executor to sell personal property of estate has been curtailed by statute. He can only sell by an order of court at public or private sale, as may be directed in such order: *Weider v. Osborn*, 20 Or. 307.

Form No. 128. — Notice of Administrator's Sale of Personal Property.

Notice is hereby given that in pursuance of an order of the superior court of the — county of —, California, made and entered on the — day of —, A. D. 18—, in the matter of the estate of —, deceased, the undersigned, administrator of said estate, will sell at public auction, for cash, subject to confirmation by said superior court, on —, the — day of —, A. D. 18—, at the hour of eleven o'clock, A. M., of said day, at No. 1620 T Street, in the city of Sacramento, California, the following described personal property, to wit (here insert description). —, Administrator of the Estate of —, Deceased.

Dated —, 18—.

Form No. 129.—Return of Sale of Personal Property, and Petition for Confirmation.

[Title of Court and Estate.]

To the Honorable Superior Court of the ——— County of ———, California.

———, the administrator of the estate of ———, deceased, respectfully returns the following account of sales made by him under the order of this court dated on the ——— day of ———, A. D. 18—, and reports as follows, to wit:—

That in pursuance of said order of sale he gave public notice for at least ten days by notices posted in three of the most public places in said ——— county of ———, in which were specified the time and place of sale, as will also and more fully appear by the affidavit marked “A,” hereunto annexed and made a part hereof;

That at the time and place specified in said notices, to wit, at No. 1620 T Street, in the city of Sacramento, county of Sacramento, California, on the ——— day of ———, A. D. 18—, at the hour of eleven o'clock, A. M., he caused to be sold, through Bell & Co., auctioneers, to the highest and best bidders, for cash, the property described in said notices, and mentioned in the account of sales contained in the affidavit marked “B,” hereunto annexed and made a part hereof;

That at such sales the persons named in said account of sales became the purchasers of the articles and at the prices set opposite their respective names; that all of the said property was present at the time of selling, except one gold ring with diamond setting, and one gold ring with emerald setting; that said sales were legally made and fairly conducted; that the bidding was good, and that the sums bid were not disproportionate to the value of the property sold; all of which will also and more fully appear by said affidavit marked “B,” hereunto annexed and made a part hereof;—

Wherefore said administrator prays that said sales be confirmed and approved, and declared valid.

———, Administrator of the Estate of ———, Deceased.

“A.”

Follow Form No. 142, *post*.

"B."

State of California, }
County of Sacramento. } ss.

—, being duly sworn, says that he is a resident of the — county of —, state of —, and is a member of the firm of Bell & Co., auctioneers, in said — county; that the property described in the foregoing notice of administrator's sale was sold by said auctioneers to the highest and best bidders for cash at No. —, — Street, in said city and county, on the — day of — A. D. 18—, at the hour of eleven o'clock, A. M., as follows, to wit (here insert in detail description of property, names of purchasers, and selling price of each article); that all of the property mentioned in said foregoing notice of administrator's sale was present at said sale, except one gold ring with diamond setting, and one gold ring with emerald setting; that said rings were not sold for that reason; that said sales were legally made and fairly conducted, and the sums bid were not disproportionate to the value of the property sold.

—, Auctioneer.

Subscribed and sworn to before me this — day of —, A. D. 18—. —, Notary Public.

Form No. 130.—Order Confirming Sale of Personal Property.

[Title of Court and Estate.]

—, administrator of the estate of —, deceased, having duly returned to this court an account and report duly verified of sales of personal property made by him under order of said court, and also filed a petition praying that said sales be confirmed and approved;

And from said account and report and other evidence it appearing to the satisfaction of this court that in pursuance of said order of sale said administrator gave public notice for at least ten days by notices posted in three public places in said — county of —, in which were specified the time and place of sale;

That at the time and place mentioned in said notice he sold to the highest bidders, for cash, the property described in said notices and mentioned in said account of sales;

That the said place of sale was a public place; that all of said property so sold by him was present at the time of selling; that the said sales were legally made and fairly conducted; that the sums bid were not disproportionate to the value of the property sold; and that said account and report are in all respects true; and no sufficient objections or exceptions being made or filed by any person interested in the estate or otherwise to the granting of said order prayed for;—

It is therefore ordered by this court that the said sales be and the same are hereby confirmed and approved, and declared valid.

—, Judge of the — Court.

Dated —, 18—.

ARTICLE III.

SUMMARY SALES OF MINES AND MINING INTERESTS.

§ 177. Mines may be sold, how.

§ 178. Petition for sale.

§ 179. Order to show cause.

§ 180. Order of sale.

§ 181. Further proceedings.

§ 177. [1529.] Mines may be Sold, how.—When it appears from the inventory of the estate of any decedent that his estate consists in whole or in part of mines, or interests in mines, such mines or interests may be sold under the order of the court having jurisdiction of the estate, as herein-after provided.

Arizona.—Same. Rev. Stats., sec. 1140.

Idaho.—Same. Rev. Stats., sec. 5499.

Montana.—Same. Comp. Stats., p. 320, sec. 181.

Utah.—Same. Comp. Laws, sec. 4153.

Wyoming.—Same, except that after the word “court” the words “or judge” are inserted. Laws 1890-91, p. 276, sec. 9.

§ 178. [1530.] Petition for Sale.—The executor or administrator, or any heir at law, or creditor of the estate, or any partner or member of any mining company, in which interests or shares are held or owned by the estate, may file in the court a petition, in writing, setting forth the general facts of the estate being then in due course of administration, and particularly describing the mine, interest, or shares which it is

desired to sell, and particularly the condition and situation of the mines or mining interests, or of the mining company in which such interests or shares are held, and the grounds upon which the sale is asked to be made.

Arizona. — Same. Rev. Stats., sec. 1141.

Idaho. — Same. Rev. Stats., sec. 5500.

Montana. — Same. Comp. Stats., p. 321, sec. 182.

Utah. — Same. Comp. Laws, sec. 4154.

Wyoming. — Same. Laws 1890-91, p. 276, sec. 10.

Estate of Boland, 55 Cal. 310.

Form No. 131. — Petition for Order of Sale of Mines and Mining Interests.

[Caption, Form No. 1, § 5, *ante*.]

1. (Follow subd. 1 of Form No. 135, § 183, *post*.)

2. (Follow subd. 2 of Form No. 135, § 183, *post*.)

3. (Follow subd. 3 of Form No. 135, § 183, *post*.)

4. That, as appears from said inventory and appraisement, which is hereby referred to and made a part hereof, the property of said estate consists wholly (or in part) of mines (or interests in mines, or shares in mines, as the case may be);

5. The following is a full description of said mines (or interests in mines, or shares in mines) of which the decedent died seised, or in which he had any interest, or in which his said estate has since acquired any interest, and the condition and value thereof: —

a. (Here insert description);

b. That said mine and the improvements thereon are appraised in the said inventory and appraisement at the sum of — dollars, and are now of the same value;

c. That upon said mine there is a substantial frame building used as a hoisting-works, in which there is situated two steam-boilers and necessary furnaces and appurtenances, a twenty-five-horse-power Corliss steam-engine, belts, pulleys, etc., hoisting apparatus, ropes, cages (give full description of all machinery in and about mine, and the location thereof, and also of all personal property appertaining thereto); that a shaft five hundred feet in depth has been sunk upon said mine; that four drifts have been run from said shaft to various distances, at a depth of one, two, three, and four hundred feet in said shaft;

d. That said mine is difficult of access, and is remote from lines of transportation, and the working of said mine is thereby rendered very expensive;

(If there is any other such property, here insert the condition, value, and situation of the same, as above);

6. That it is to the best interest of the estate that all of said mining property should be sold, because (here insert as many reasons as there are why it is to the best interest, etc.); (or as follows):—

6. That an immediate sale of said mining property is necessary, in order to secure the just rights and interests of the surviving tenants in common (or mining partners) of said mining property, because (here state reasons therefor);¹—

Wherefore your petitioner prays that an order be made by this court directing all persons interested to appear before this court at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to your petitioner to sell said mine (mining interests, shares, or stocks, as the case may be), and that after a full hearing of this petition and examination of the proofs and allegations of the parties interested, and due proof of the publication of a copy of said order to show cause, etc., an order of sale be made authorizing your petitioner to sell at public auction said mine (mining interests, shares, or stocks, as the case may be), or that such other or further order may be made as is meet in the premises.

—, Petitioner.

—, Attorney for Petitioner.

Verification as in Form No. 99, § 143, *ante*.

Form No. 132. — Another Form for the Foregoing.

[Caption, Form No. 1, § 5, *ante*.]

1. (Follow subd. 1 of Form No. 135, § 183, *post*.)
2. (Follow subd. 2 of Form No. 135, § 183, *post*.)
3. (Follow subd. 3 of Form No. 135, § 183, *post*.)
4. (Follow subd. 4 of Form No. 131, § 178, *ante*.)
5. (Follow subd. 5 of Form No. 131, § 178, *ante*.)

¹ Note 1 to Form No. 135, § 183, *post*, is applicable to this form.

¹ Note 2 to Form No. 135, § 183, *post*, is applicable to this form.

6. (Follow subd. 4 of Form No. 135, § 183, *post.*)
 7. (Follow subd. 5 of Form No. 135, § 183, *post.*)
 8. (Follow subd. 6 of Form No. 135, § 183, *post.*)
 9. (Follow subd. 7 of Form No. 135, § 183, *post.*)
 10. (Follow subd. 8 of Form No. 135, § 183, *post.*)
 11. (Follow subd. 9 of Form No. 135, § 183, *post.*, down to the description.)
 12. (Follow subd. 10 of Form No. 135, § 183, *post.*)
 13. (Follow subd. 6 of Form No. 135, § 183, *post.*)
 14. (Follow subd. 12 of Form No. 135, § 183, *post.*)
- Prayer. (Follow prayer of Form No. 131).
 Verification as in Form No. 99, § 143, *ante*.

§ 179. [1531.] Order to Show Cause—Notice.—

Upon the presentation of such petition, the court, or a judge thereof, must make an order directing all persons interested to appear before such court at a time and place specified, not less than four or more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell such mine, mining interests, shares, or stocks as are set forth in the petition and belonging to the estate. A copy of the order to show cause must be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or published at least four successive weeks in such newspaper as such court or judge shall specify. If all persons interested in the estate signify, in writing, their assent to such sale, the notice may be dispensed with.

Arizona. — Same. Rev. Stats., sec. 1142.

Idaho. — Same. Rev. Stats., sec. 5501.

Montana. — Same. Comp. Stats., p. 321, sec. 183.

Utah. — Same. Comp. Laws, sec. 4155.

Wyoming. — Same, except that after the words "before such court," the words "or judge" are inserted. Laws 1890-91, p. 276, sec. 11.

**Form No. 133.—Order to Show Cause on Sale of
 Mines or Mining Interests.**

[Title of Court and Estate.]

It appearing to this court by the petition this day presented and filed by —, the administrator of the estate of —, de-

ceased, praying for an order of sale of the mining property of said estate, that it is to the best interest of said estate that all of said mining property should be sold (or that an immediate sale of all of said mining property is necessary, in order to secure the just rights and interests of the surviving tenants in common (or mining partners) of said mining property), —

It is therefore ordered by the court that all persons interested appear before this court on the — day of —, A. D. 18—, at the hour of ten o'clock, A. M., of said day, at the court-room of said court, at the court-house at the city of Sacramento, county of Sacramento, state of California, to show cause why an order should not be granted to said administrator to sell all of said mining property; it is further ordered that a copy of this order be published four successive weeks in the Weekly Bee, a newspaper printed and published in said county.

Dated —, 18—.

—, Judge of — Court.

§ 180. [1532.] Order of Sale.—If, upon hearing the petition, it appears to the satisfaction of the court that it is to the interest of the estate that such mining property or interests of the estate should be sold, or that an immediate sale is necessary, in order to secure the just rights or interests of the mining partners or tenants in common, such court must make an offer authorizing the executor or administrator to sell such mining interests, mines, or shares, as hereinafter provided.

Arizona.—Same. Rev. Stats., sec. 1143.

Idaho.—Same. Rev. Stats., sec. 5502.

Montana.—Same. Comp. Stats., p. 321, sec. 184.

Utah.—Same. Comp. Laws. sec. 4156.

Wyoming.—Same as California, except that the words “or judge” are inserted after the word “court,” the first time it occurs in the section. Laws 1890-91, p. 276, 277, sec. 12.

An executor having shares of stock on hand liable to assessment should either get an order to sell it, or if the estate is solvent without it, should turn it over to the legatees. He should not borrow money to pay assessments: *Lucich v. Medin*, 3 Nev. 93.

Mining stocks belonging to an estate which are only an expense to it should be sold, unless it is quite evident that it would be for the best interest of the estate to hold them: *In re Millenovich*, 5 Nev. 161.

Form No. 134. — Order of Sale of Mines and Mining Interests.

[Title of Court and Estate.]

The administrator of the estate of —, deceased, having, on the — day of —, A. D. 18—, presented his verified petition praying for an order to sell certain mines (mining interests, shares, or stocks in mines, as the case may be), which are hereinafter described, and which belong to the estate of said deceased, and the matter coming on regularly for hearing this day, and it appearing to the satisfaction of the court that due publication of a copy of the order to show cause has been duly and legally published as required by law before said hearing, as directed by this court, and it further appearing to the satisfaction of the court that it is to the best interest of said estate that all of said mines (etc.) should be sold (or that an immediate sale of said mining property is necessary, in order to secure the just rights and interests of the surviving tenants in common (or mining partners) of said mining property), —

It is hereby ordered, adjudged, and decreed that the said —, the administrator of said estate, be and he is hereby authorized to sell the following described mines (etc.) belonging to said estate (here insert description) at public auction (or "private sale," or "either public or private sale, as said administrator shall judge to be most beneficial for said estate, pursuant to the prayer of said petition") to the highest bidder, upon the following terms, to wit, for cash, gold coin of the United States, ten per cent of the bid payable at the time of sale, and balance upon confirmation by this court.

—, Judge of the — Court.

NOTE. — The notes to Form No. 105 are applicable to the foregoing form.

§ 181. [1533.] Further Proceedings. — After the order of sale is made, all further proceedings for the sale of such mining property, and for the notice, report, and confirmation thereof, must be in conformity with the provisions of Article IV. of this chapter.

For Article IV. of this chapter, see next section.

Arizona. — Same. Rev. Stats., sec. 1144.

Idaho. — Same. Rev. Stats., sec. 5503.

Montana. — Same. Comp. Stats., p. 321, sec. 185.

Utah.—Same. Comp. Laws, sec. 4157.

Wyoming.—“The court or judge may make order for public sale of such mining property, to take place in the same manner as provided for public sales of personal property in this chapter.” Laws 1830-91, p. 277, sec. 13.

ARTICLE IV.

THE SALE OF REAL ESTATE, INTERESTS THEREIN, AND CONFIRMATION THEREOF.

- § 182. To sell real and personal estate.
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- § 210. Conditions of sale.
- § 211. Purchaser to give bond.
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- § 220. Who cannot purchase.

§ 182. [1536.] To Sell Real and Personal Estate.

— When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies, the executor or administrator may also sell any real as well as personal property of the estate for that purpose, upon the order of the court; and an application for the sale of real property may also embrace the sale of personal property.

Arizona. — Same. Rev. Stats., sec. 1145.

Idaho. — “The personal estate of the decedent which comes into the hands of the executor or administrator is first chargeable with the payment of the debts and expenses; if the goods, chattels, rights, and credits in the hands of the executor or administrator are not sufficient to pay the debts of the decedent, the expenses of administration, and the allowance to the family, the whole of the real estate may be sold for that purpose by the executor or administrator.” Rev. Stats., sec. 5490.

“When the personal estate in the hands of the executor or administrator is exhausted, or insufficient to pay the allowance of the family, the debts outstanding against the decedent, and the debts, expenses, and charges of administration, the executor or administrator may sell the real estate for that purpose, upon the order of the probate court.” Rev. Stats., sec. 5504.

Montana. — Same as Idaho, sec. 5504, *supra*. Comp. Stats., p. 320, sec. 186.

Nevada. — Same as Montana. Gen. Stats., sec. 2823.

“When a testator shall have given any legacy by will that is effectual to pass or charge real estate, and his goods, chattels, rights, and credits shall be insufficient to pay a legacy, together with his debts and the charges of administration, the executor or administrator with the will annexed may obtain an order to sell his real estate for that purpose, in the same manner and upon the same terms and conditions as are prescribed in this chapter in case of a sale for the payment of debts.” Gen. Stats., sec. 2845.

Oregon. — “When the proceeds of the sale of personal property have been exhausted, and the charges, expenses, and claims specified in section 1142 have not all been satisfied, the executor or administrator shall sell the real property of the estate, or so much thereof as may be necessary for that purpose.” Hill’s Laws, sec. 1145.

Utah. — Same as California. Comp. Laws, sec. 4158.

Washington. — Same as Idaho, sec. 5490, *supra*. Code Proc., sec. 966. See also Code Proc., sec. 976, under § 168, *ante*. Same as Nevada, sec. 2845, *supra*. Code Proc., sec. 1025.

Wyoming. — Same as California. Laws 1890–91, p. 277, sec. 14.

“Whenever it appears to the court or judge, on any hearing of an application for the sale of real property, that it would be for the interest of the estate that personal property of the estate, or some part of such property, should be first sold, the court or judge may order or decree the sale of such personal

property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance." Laws 1890-91, p. 285, sec. 58.

Sale, etc.: See § 191, *post*.

A sale of real estate of a deceased wife may be ordered for the purpose of paying a mortgage given by her to secure a husband's indebtedness: *In re Marsden*, Myr. Prob. 184. See *Wright v. Edwards*, 10 Or. 301.

Where there was no personal property of a decedent, it was proper to order a sale of the real estate to pay expenses of administration and taxes assessed against the real estate after the death of the decedent, although no other debts were proved: *Hanford v. Davies*, 1 Wash. 476.

An order for the sale of realty is void if made to pay for improvements made years after the death of the decedent, and while there was no administration: *Cain's Heirs v. Young*, 1 Utah, 361.

The homestead of a family is not subject to sale by an administrator to pay debts, nor can any part of it be given away by the widow, nor otherwise taken from the heirs, except by due process of law, in suits to which the heirs are parties: *Cain's Heirs v. Young*, 1 Utah, 361.

On the decease of an intestate pre-emptor, whose title to the land he occupied at the time of death is yet inchoate, a salable possessory right passes to the administrator: *Burch v. McDaniel*, 2 Wash. Ter. 58.

The administrator may dispose of property in which the estate holds an inchoate interest in such manner as is demanded by the best interest of the estate, and it is his duty to perfect the title in such property for the benefit of the heirs: *Burch v. McDaniel*, 2 Wash. Ter. 58.

§ 183. [1537.] Petition, What to Contain.—To obtain such order for the sale of real property, he must present a verified petition to the superior court, or a judge thereof, setting forth the amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses, and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which the decedent died seised, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof, and whether the same be community or separate property; the names of the legatees and devisees, if any, and of the heirs of the deceased, so far as known to the petitioner. If any of the matters here enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings if

the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the decree.

Arizona. — Same. Rev. Stats., sec. 1146.

Idaho. — Same, to the words "a general description." The balance of section as follows: "A description of all the real estate of which the decedent died seised, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value of the respective portions and lots thereof, and whether the same, be community or separate property; the names and ages of the devisees, if any, and of the heirs of the decedent. If all the matters above enumerated cannot be ascertained, it must be so stated in the petition." Rev. Stats., sec. 5505.

Montana. — Same as California. Comp. Stats., p. 322, sec. 187.

Nevada. — Same as Idaho. Gen. Stats., sec. 2824.

Oregon. — "The petition for the order of sale of real property shall state the amount of the sales of personal property, the charges, expenses, and claims still unsatisfied, so far as the same can be ascertained, a description of the real property of the estate, the condition and probable value of the different portions or lots thereof, the amount and nature of any liens thereon, the names, ages, and residence of the devisees, if any, and of the heirs of the deceased, so far as known." Hill's Laws, sec. 1146. 3

Utah. — Same as California. Comp. Laws, sec. 4159.

Washington. — "To obtain such order, he shall present a petition to the court, setting forth the amount of the personal estate that has come to his hands, and how much, if any, remains undisposed of, a list and the amounts of the debts outstanding against the deceased, as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seised, the condition and value of the respective lots and portions, the names and ages of the devisees, if any, and of the heirs of the deceased, which petition shall be verified by the oath of the party presenting the same." Code Proc., sec. 1005.

Wyoming. — Same as California. Laws 1890-91, p. 277, sec. 15.

Petition, Order, and Sale: See § 171, *ante*.

A sale made under order of the probate court by a guardian of infant devisees under a will, of the real estate devised to his wards, will not be effectual to confer a valid title, unless the court acquired jurisdiction of the proceeding for sale by the presentation of a proper petition by the guardian: *Fitch v. Miller*, 20 Cal. 352.

The petition, in order to give jurisdiction, must contain the statement and showing required by law: *Fitch v. Miller*, 20 Cal. 352.

The necessity or expediency of the sale must arise from one or more of these circumstances: 1. The existence of debts due from the ward which

cannot be paid out of his personal estate and the income of his real estate; 2. The insufficiency of the income of the estate of the ward to maintain him and his family, or to educate his children, or to educate him when a minor; 3. That it would be for the benefit of the ward that his real estate, or a part thereof, should be sold, and the proceeds put out at interest or invested in some productive stock: *Fitch v. Miller*, 20 Cal. 352.

The petition must set forth the condition of the estate; but it is only necessary to state the condition in such manner as to enable the court to judge of the existence of one or more of the circumstances above specified: *Fitch v. Miller*, 20 Cal. 352.

The statute does not directly require, nor is it essential, that the value of the several items and parcels of property of which the estate consists should be stated: *Fitch v. Miller*, 20 Cal. 352.

The jurisdiction of the court to order the sale depends upon the sufficiency of the averments of the petition, and not upon the truth of those averments. If the statements of a petition were untrue in fact, and in consequence thereof injustice should be done, this might furnish ground for setting aside the sale by a direct proceeding for that purpose; but it would not reach the point of jurisdiction, or authorize the sale to be treated as a nullity, when questioned collaterally: *Fitch v. Miller*, 20 Cal. 352.

So where the petition stated the interest of the wards in a certain rancho to be two thousand acres, when in reality it was four thousand acres, but asked the sale of their whole interest: Held, that the mistake did not affect the jurisdiction of the court or the validity of the purchaser's title: *Fitch v. Miller*, 20 Cal. 352.

In stating the facts and circumstances tending to show the necessity or expediency of the sale, it is not absolutely necessary that the petition should directly aver that there are debts to be paid, or that the income is not sufficient for the support and education of the wards, or that it would be for the benefit of the wards that the property should be sold and the proceeds put at interest. If, by a fair application of all the statements, it can be seen that one or more of these three contingencies exist, it is sufficient to give jurisdiction: *Fitch v. Miller*, 20 Cal. 352.

Thus where a petition for the sale of an interest in the Sotoyome Rancho stated that the rancho was unproductive; that the greater part of it was occupied by persons who refused to pay any rent, and who were cutting down and destroying trees; and that it was subjected to heavy taxes, which would amount to more than the value of the land by the time all the infants should come of age: Held, that these statements presented a case for the exercise of the judgment of the court, as to the necessity or expediency of the sale for the purpose

of investment, and gave it jurisdiction to make the order: *Fitch v. Miller*, 20 Cal. 352.

A will by which interests in real estate were devised to certain infants provided that the devisees might each "take out" one half of his share when he should come of age, and the other half not until all the other children should come of age, and it was objected to the validity of a sale made by the guardian of the devisees under order of the probate court, that the above provision of the will so controlled the disposition of the property that it was not the subject of sale by the guardian: Held, that whatever effect this provision might have in controlling the use of the property, the title to it, the estate of the devisee, vested in them upon the death of the testator, and this estate was the subject of sale under the provisions of the statute, and the effect of its sale was to transfer whatever estate the wards had to the purchaser: *Fitch v. Miller*, 20 Cal. 352.

The liability of the property of wards to be sold by their guardians, under the order of the probate court, is not affected by the fact that their testator died before the adoption of the common law in this state: *Fitch v. Miller*, 20 Cal. 352.

The fact that, in a proceeding in the probate court for the purpose of obtaining a sale of the real estate of infant devisees, certain adult co-devisees were allowed to appear, and their interests improperly made the subject of consideration in connection with the proceeding, and that these adults joined in the sale, and a partition incidentally resulted therefrom, are not sufficient irregularities to invalidate the sale. It is sufficient, to support the sale, that the facts rendering it necessary or expedient were brought before the court by the petition of the guardian, and that the estate of the infants was duly ordered to be sold: *Fitch v. Miller*, 20 Cal. 352.

A petition for a probate sale may properly refer to the schedules of the inventory for a particular description of certain real property belonging to the estate; and the fact that the inventory also refers to a map or diagram on file, which cannot be found at the time of a subsequent

trial of a cause involving the validity of the sale, seventeen years afterward, will not affect the jurisdiction, if the inventory, taken in connection with the averments of the petition, sufficiently shows what the interest of the deceased in the real property was at the time of his death, and contained a full description of the real property of the estate at the time the sale was asked, and gave to the court all the information upon that subject contemplated by the code: *Richardson v. Butler*, 82 Cal. 174.

The designation of a city lot as unimproved is a sufficient description of its condition, in a petition for a probate sale, to give the court jurisdiction: *Richardson v. Butler*, 82 Cal. 174.

The statement that there are no debts or expenses of administration accrued and unpaid is sufficient to vest jurisdiction, so far as that point is concerned, if prior accounts are settled, and the petition seeks a sale to provide for a family allowance and future expenses of administration: *Richardson v. Butler*, 82 Cal. 174.

If schedules attached to a petition for a probate sale, and made part of it, are placed after the verification, it will not affect the validity of the verification: *Richardson v. Butler*, 82 Cal. 174.

Averments of a petition for the sale of real estate which substantially comply with the statute are sufficient, and a petition which fully and fairly answers the purpose of the statute will confer jurisdiction. The jurisdiction depends on the averments of the petition, and not upon their truth or falsity: *Richardson v. Butler*, 82 Cal. 174.

A substantial compliance with the law in regard to probate sales is sufficient as against a collateral attack. Such a sale cannot be objected to as void for want of jurisdiction in ejectment by an heir of the decedent against the purchaser, upon the ground that the petition for the sale failed to state the value of the property sought to be sold, if it stated that a full description of all the real estate of which the said decedent died seised, etc., and the condition and value of said real estate, are set forth in a certain schedule annexed to the petition,

which gave a full description of the property in contest, and showed its condition and appraised value. In the absence of a special demurrer for uncertainty, the averment in the body of the petition may be taken as an averment that the amount named in the schedule was the present value of the property at the time of the petition: *Silverman v. Gundelfinger*, 82 Cal. 548.

A sale of real property of a decedent made under an order of court is not necessarily void, although the petition for the order of sale, the citation to the heirs, and the service of the citation are defective: *Mitchell v. Campbell*, 19 Or. 455.

Such defects should be disregarded, where the property sold at such sale has been purchased for a valuable consideration, which has been paid by the purchaser to the executor or administrator, or his successor, in good faith, and the sale has not been set aside, but has been confirmed or acquiesced in by the court: *Mitchell v. Campbell*, 19 Or. 455.

A substantial compliance with the above section is sufficient in a petition for an order to sell real property belonging to the estate of a decedent: *In re Arguello*, 85 Cal. 151.

An order of sale of real estate to meet expenses of administration may be made without a final adjudication of the executor's account. It is only necessary that the petition should show a legal necessity for the sale: *Abila v. Burnett*, 33 Cal. 658; *Haynes v. Meeks*, 20 Cal. 288.

In an application to sell real estate to pay debts of the estate, a judgment recovered against the administrator is *prima facie* evidence of the indebtedness of the estate, as against the devisee of the real estate or his grantee: *In re Schroeder*, 46 Cal. 304.

The petition and subsequent proceedings must be participated in by all the executors who qualify, or the sale will be void: *Gregory v. McPherson*, 13 Cal. 562.

Surplus and redundant matter in a petition for the sale of real estate does not affect the jurisdiction of the court, and may be disregarded: *Townsend v. Gordon*, 19 Cal. 188; *Stuart v. Allen*, 16 Cal. 473.

An alternative prayer in such petition renders it defective, but does not affect the jurisdiction of the court: *Townsend v. Gordon*, 19 Cal. 188.

But reference may be made in the petition to any other paper or thing to show the facts required by law to exist: *Stuart v. Allen*, 16 Cal. 473; *Fitch v. Miller*, 20 Cal. 352; *Wilson v. Hastings*, 66 Cal. 243; *In re Bentz*, 36 Cal. 687; *Gregory v. Taber*, 19 Cal. 397; *Townsend v. Gordon*, 19 Cal. 207.

The petition, in referring to the inventory for the particulars required by the statute, must state that the reference is made for description, or value, or condition. A statement that reference is made "for greater certainty" is not sufficient: *Wilson v. Hastings*, 66 Cal. 243; *In re Smith*, 51 Cal. 563; *Haynes v. Meeks*, 20 Cal. 288.

The petition must describe the condition of the land to be sold. A clause in the statute that a failure to give such description shall not invalidate the proceedings if the defect is supplied by proof and stated in the decree does not apply when the petition is attacked by demurrer, or when the objection is taken upon appeal from the order of sale: *In re Smith*, 51 Cal. 563.

The petition must contain a description of all the real estate of which the testator or intestate deed seized: *Wilson v. Hastings*, 66 Cal. 243; *Gharkey v. Werner*, 66 Cal. 389; *Haynes v. Meeks*, 20 Cal. 288; *Townsend v. Gordon*, 19 Cal. 188. If such petition is deficient in this respect, it cannot be amended at the hearing so as to make an order of sale based thereon valid without further notice. The court should treat the petition, when amended, as a new petition, and proceed *de novo*: *In re Gharkey*, 57 Cal. 274.

An insufficient description as to one of several parcels of land referred to in the petition will deprive the court of jurisdiction, although the remaining parcels are sufficiently described: *Wilson v. Hastings*, 66 Cal. 243. Description of lands as "the undivided one-half part of one league of land on Clear Lake," or "the undivided one-half part of a farm and vineyard at Sonoma, containing 833 acres more or less," are insufficient: *Wilson v. Hastings*, 66 Cal. 243. But an accurate or exact description of

real estate in a petition for its sale is not necessary. It is too strict a rule: *Stuart v. Allen*, 16 Cal. 473.

The petition must set forth the condition of the respective portions and lots: *Wilson v. Hastings*, 66 Cal. 243; *Haynes v. Meeks*, 20 Cal. 288; *Townsend v. Gordon*, 19 Cal. 188.

It must also set forth their value: *Wilson v. Hastings*, 66 Cal. 243; *Townsend v. Gordon*, 19 Cal. 188.

Where the petition averred that no personal property had come to the hands of the administrator; that to his knowledge there was none; that a former administrator of the same estate had disposed of the whole of it; that the petitioner was also a creditor, had made every effort in his power to collect from the former administrator the amount due to him on a judgment against the estate, without success. The petition did not state the amount of the personal property which had come to the hands of the former administrator, nor what disposition had been made of it, nor that any effort had been made to ascertain what had become of it, or to compel the former administrator to account, nor the condition nor value of the real estate of which the intestate deed seized, nor the condition of the parcels described. It was held to be fatally defective, and that the court acquired no jurisdiction of the proceedings for the sale; that the order to sell and the sale made in pursuance of it were void; that the purchaser acquired no title; that the invalidity of the sale, by reason of the defect in the petition, might be shown in bar of a recovery in ejectment by the purchaser against one claiming under a conveyance from the heirs: *Haynes v. Meeks*, 20 Cal. 288.

Failure to verify a petition, when the statute requires it to be verified, is but an irregularity, and will not render the proceedings open to collateral attack: *McCoy v. Ayres*, 2 Wash. Ter. 207.

It is immaterial whether a creditor has the right to petition for the sale of real property belonging to the estate of a decedent, if the administrator joins in the petition: *In re Arguello*, 85 Cal. 151.

The statute of limitations does not run while the administration is pending and unsettled, as to a claim

against the estate which has been allowed, so as to disqualify the creditor from petitioning for an order of sale: *In re Arguello*, 85 Cal. 151.

Laches will in some cases defeat a creditor's petition for sale of property of the estate, and the probate court has discretionary power to deny a creditor's petition for the sale

of real property, when there has been unreasonable delay without circumstances to excuse it; but where the court finds that the delay was excusable, its decision allowing the petition will not be reversed, unless it appears that the court below has abused its discretion: *In re Arguello*, 85 Cal. 151.

Form No. 135.—Petition for Order of Sale of Real Estate.

[Caption, Form No. 1, § 5, *ante*.]

1. That — died intestate on the — day of —, A. D. 18—, in the — county of —, state of —, being at the time of — death a resident of the — county of —, state of —;

2. That your petitioner is the duly appointed, qualified, and acting administratrix of the estate of said —, deceased;

3. That your petitioner has duly made and returned to this court a true inventory and appraisement of all the estate of the said deceased which has come to her possession or knowledge, and she has caused to be published due and legal notice to the creditors of said decedent;

4. That the personal estate that has come to the hands of petitioner is as follows, to wit: Household furniture, pictures, and ornaments in dwelling-house No. 716, M Street, Sacramento City, appraised at the sum of \$100; also the sum of \$137.50 cash, being money received as rents of a portion of the real estate belonging to the estate of decedent;

5. That a portion of said personal property has been disposed of as follows, to wit, the sum of \$50 cash, paid out on account of expenses of administration, leaving in the hands of your petitioner the sum of \$87.50 cash, and the above-mentioned household furniture, pictures, and ornaments;

6. That the debts outstanding against the said deceased, as far as can be ascertained or estimated, amount at this date to the sum of \$703.61, and are the following claims, which have been duly allowed and approved by said administratrix and a judge of this court, and duly filed herein, to wit (here assert list of claims so allowed, approved, and filed);

7. That the debts, expenses, and charges of administration

already accrued and remaining unpaid amount to the sum of \$12.75, and are as follows, to wit (here insert detailed statement of said debts, expenses, and charges of administration already accrued and remaining unpaid);

8. That the debts, expenses, and charges of administration that will or may accrue during the administration are estimated by your petitioner at the sum of \$335, and are as follows, to wit (here insert detailed statement of such debts, expenses, and charges of administration);

9. That the said debts outstanding against the deceased, the said debts, expenses, and charges of administration already accrued and remaining unpaid, and the estimated debts, expenses, and charges of administration that will or may accrue, amount to the sum of \$1,051.36;

The following is a full description of all the real estate of which the decedent died seised, or in which she had any interest, or in which the said estate has acquired any interest, and the condition and value thereof:—

a. The west quarter of lot No. 3, in the square bounded by M and N and Seventh and Eighth streets, in the city of —, county of —, state of —, as laid down on the official map of said city, and the improvements thereon appraised in the said inventory and appraisal at the sum of eighteen hundred dollars. Upon said west quarter of lot No. 3 is a substantial two-story brick dwelling-house facing on M Street, and also a small frame dwelling fronting on the alley running through said square; said brick dwelling is now, and has been for three years last past, rented at a monthly rental of twenty dollars, and said frame dwelling is now, and has been for two years last, rented at a monthly rental of eight dollars;

b. The north half of the east quarter of lot No. 2 in the square bounded by N and O and Fifth and Sixth streets, in said city, as laid down on the official map thereof, and the improvements thereon, appraised in the inventory and appraisal on file herein at the sum of one thousand dollars; the improvements referred to consist of a two-story frame building fronting on said N Street; said frame building is not now rented, and has not been within one year last past.

10. Your petitioner therefore alleges that the personal estate in the hands of your petitioner is greatly insufficient to pay the debts outstanding against the deceased, and the debts, expenses, and charges of the administrator, and that it is necessary to sell the whole or some portion of the real estate for such purposes;

11. That your petitioner deems it for the best interest of the estate, and all the parties interested therein, that the said north half of the east quarter of lot No. 2, in the square bounded by N and O and Fifth and Sixth streets, of said city of Sacramento, and the improvements thereon, be sold, in order that the proceeds may be applied to the payment of the debts outstanding against the deceased, and the debts, expenses, and charges of administration;

12. That the following are the names of the heirs of said deceased, to wit, — and —, the children of said deceased;¹—

Wherefore your petitioner prays that an order be made by this court directing all persons interested in said estate to appear before this court at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to your petitioner to sell so much of the real estate of the deceased as shall be necessary, and that after a full hearing of this petition and examination of the proofs and allegations of the parties interested, and due proof of the publication of a copy of said order to show cause, etc., an order of sale be made authorizing your petitioner to sell at public auction² so much and such parts of the real estate as said court shall judge necessary or beneficial, or that such other or further order may be made as is meet in the premises. —, Petitioner.

—, Attorney for Petitioner.

Verification as in Form No. 99, § 143, *ante*.

¹ If a private sale is desired, here insert the following allegation: 13. In the opinion of your petitioner, a private sale of said property would be most beneficial for the estate.

² When desired, in lieu of the words "at public auction," insert "at private sale," or "at either public or private sale, as the administrator (or executor) shall judge to be most beneficial for the estate," as the case may be.

§ 184. [1538.] Order to Appear. — If it appears to the court or judge, from such petition, that it is necessary to sell the whole or some portion of the real estate for the purposes and reasons mentioned in the preceding section, or any of them, such petition must be filed and an order thereupon made directing all persons interested in the estate to appear before the court, at a time and place specified, not less than four nor more than ten weeks from the time of making of such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary.

Arizona. — Same. Rev. Stats., sec. 1147.

Idaho. — Same. Rev. Stats., sec. 5506.

Montana. — Same. Comp. Stats., p. 322, sec. 188.

Nevada. — Same. Gen. Stats., sec. 2825.

Oregon. — "Upon the filing of the petition, a citation shall issue to the devisees and heirs therein mentioned, and to all others unknown, if any such there be, to appear at a term of court therein mentioned, not less than ten days after the service of such citation, to show cause, if any exist, why an order of sale should not be made as in the petition prayed for." *Hill's Laws*, sec. 1147.

Utah. — Same as California. Comp. Laws, sec. 4160.

Washington. — Same as California, except as to time, which is, "not less than four nor more than eight weeks from the time of making such order." Code Proc., sec. 1006.

Wyoming. — Same as California, except that after the words "before the court" the words "or judge" are inserted. *Laws 1890-91*, pp. 277, 278, sec. 16.

An order to show cause is void if the interval between the date of the order and the day fixed for the hearing of the petition for an order of sale of real estate is less than the time fixed by law for the publication of notice, or than the time allowed by law from the date of the order for interested parties to appear and show cause. All proceedings based upon such a void order are void; *Townsend Tallant*, 33 Cal. 45.

Form No. 136. — Order to Show Cause Why Order of Sale of Real Estate Should not be Made.

[Title of Court and Estate.]

It appearing to this court, by the petition this day presented and filed by —, the administrator of the estate of —, deceased, that it is necessary to sell the whole or some portion of the real estate of said decedent to pay the debts of decedent and the expenses and charges of administration, —

It is therefore ordered by this court that all persons interested in the estate of said deceased appear before the said superior court on —, the — day of —, A. D. 18—, at the hour of — o'clock, — M., of said day, at the court-room of said court, at the court-house in the city of —, — county of —, state of California, to show cause why an order should not be granted to said administrator to sell so much of the said real estate as shall be necessary and that a copy of this order be published four successive weeks in the Weekly Bee, a newspaper printed and published in said county.

Dated —, 18—. —, Judge of — Court.

§ 185. [1539.] To be Served — Hearing — Assent. —

A copy of the order to show cause must be personally served on all persons interested in the estate, any general guardian of a minor so interested, and any legatee, or devisee, or heir of the decedent, provided they are residents of the county, at least ten days before the time appointed for hearing the petition, or be published four successive weeks in such newspaper in the county as the court or judge shall direct. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with, and the hearing may be had at any time.

Arizona. — Same. Rev. Stats., sec. 1148.

Idaho. — "A copy of the order to show cause must be personally served on all persons interested in the estate, and on any general guardian of any minor, devisee, or heir of the decedent resident in the county, at least five days before the time appointed for hearing the petition, or must be published at least four successive weeks in such newspaper as the court or judge shall direct. The notice is served if the publication is completed five days before the day set for hearing. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with." Rev. Stats., sec. 5507.

Montana. — Same. Comp. Stats., p. 322, sec. 189.

Nevada. — "A copy of such order to show cause shall be personally served on all persons interested in the estate, at least five days before the time appointed for hearing the petition, or shall be published at least four successive weeks in such newspaper as the court or judge shall order; *provided, however*, if all persons interested in the estate shall signify in writing their assent to such sale, the notice may be dispensed with." Gen. Stats., sec. 2826.

Oregon. — "Upon an heir or devisee known and resident within this state

such citation [Hill's Laws, sec. 1147, under last section] shall be served and returned as a summons, and upon an heir or devisee unknown or non-resident it may be served by publication, not less than four weeks, or for such further time as the court or judge may prescribe. When service of the citation is made by publication, there shall be published with it a brief description of the property described in the petition." Hill's Laws, sec. 1148.

Utah. — Same as California. Comp. Laws, sec. 4161.

Washington. — Same of Nevada. Code Proc., secs. 1007, 1009.

Wyoming. — Same as California. Laws 1890-91, p. 278, sec. 17.

Publication of Notice: See § 315, *post*.

Guardian. — When Infant a Party: Cal. Code Civ. Proc., secs. 372, 373. See §§ 332, 548, *post*.

Court may Appoint Attorney: See § 328, *post*.

There must be either personal or constructive service, or all interested persons must join in the petition, or signify their consent in writing: *Pearson v. Pearson*, 46 Cal. 635.

An heir must be cited, and has a right to be heard: *Beckett v. Selover*, 7 Cal. 215.

The ten days' notice was not required to be given to the attorney for minor heirs prior to 1865: *Richardson v. Musser*, 54 Cal. 196.

Notice is not waived by the appearance of a minor in court: *In re Bartels*; Myr. Prob. 130.

Publication of order to show cause why an administrator's petition for the sale of the real estate of a decedent should not be granted, and of the notice of the sale of such real estate, may be made in such newspaper in the county as the court or judge shall direct, for the number of successive weeks required by the statute, though such paper be published weekly only, and though other papers are published daily in the same county: *In re O'Sullivan*, 84 Cal. 444.

Where, upon petition to sell real estate of the deceased, the usual order to show cause, etc., was entered, and on the same day a guardian *ad litem* was appointed for absent and minor heirs, and on the same day said guar-

dian appeared and consented to an order of sale, which was thereupon made, it was held that this order of sale is not void because the order to show cause, etc., was not served on the minor heirs, or because the guardian was appointed, and the order to show cause was made on the same day. *The statute is silent as to the time the guardian ad litem is to be appointed: Stuart v. Allen*, 16 Cal. 473.

After a guardian *ad litem* appears, and consents to an order of sale, the court has jurisdiction over the subject and the parties. At what time after this the court should act upon the petition was within its discretion: *Stuart v. Allen*, 16 Cal. 473.

The court will not acquire jurisdiction to make an order of sale of real property of an estate if the law requires an order of court directing all persons interested to show cause why the real estate should not be sold, to be published four successive weeks before the return day in a paper designated by the court, and this was not done, but said order was published three weeks in the paper designated by the court, and then one week in another paper designated by the administrator: *Townsend v. Tallant*, 33 Cal. 45.

Sale is void as to infant heir who is not made a party: *Fisk v. Kellogg*, 3 Or. 503.

Order of sale may be collaterally attacked when it appears that an important party in interest was not made a party to the proceedings: *In re Gibbs*, Sup. Ct. Utah, April 20, 1885.

§ 186. [1540.] Hearing after Proof of Service. — The court, at the time and place appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service or publication of a copy

of the order, by affidavit or otherwise, if the consent, in writing, to such sale of all parties interested is not filed, must proceed to hear the petition, and hear and examine the allegations and proofs of the petitioners, and of all persons interested in the estate who may oppose the application. All claims against the decedent not before presented, if the period of presentation has not elapsed, may be presented and passed upon at the hearing.

Arizona. — Same. Rev. Stats., sec. 1149.

Idaho. — Same; last sentence omitted. Rev. Stats., sec. 5508.

Montana. — Same as California. Comp. Stats., p. 323, sec. 190.

Nevada. — Same as Idaho. Gen. Stats., sec. 2827.

Utah. — Same as California. Comp. Laws, sec. 4162.

Washington. — Same as Idaho. Code Proc., secs. 1808, 1496.

Wyoming. — Same as California. Laws 1890-91, p. 278, sec. 18.

If petition for sale of real property of estate, citation to heirs, and its service, are defective, the sale is not necessarily void: *Mitchell v. Campbell*, 19 Or. 455.

It is no ground of opposition to the granting of an order of sale of real estate, that the estate holds a litigated claim against the grantee of a devisee: *In re Schroeder*, Myr. Prob. 7; affirmed 46 Cal. 304.

The heirs of the deceased have

a right to go behind the allowance of claims, and to require proof of the original indebtedness upon the hearing of the petition for sale of real estate to pay debts: *Beckett v. Selover*, 7 Cal. 215.

At the hearing of an application to sell real estate, heirs cannot raise questions of heirship, or object to any delay or irregularity in the settlement of the estate: *In re Houck*, Sup. Ct. Or., Feb. 29, 1888.

Form No. 137. — Objections to Granting Order of Sale of Real Estate.

[Title of Court and Estate.]

—, one of the heirs at law of said decedent, shows the following causes why the order of sale of real estate prayed for in the petition of —, heretofore filed herein, should not be granted: —

1. That the order to show cause made herein was not published for four successive weeks in any newspaper printed in this county, nor was it served personally on any of the heirs at law who reside in this county;

2. That the estate of said deceased is not indebted to —, as set forth in said petition, for the reason that the claim upon which said alleged indebtedness is based was at the time of the allowance thereof by the administrator barred by the provisions of subdivision — of section — of the Code of Civil Procedure (state any other cause that exists);

3. (State objections to any claim alleged to be due from the estate in the petition in the same manner); —

Wherefore he prays that the order sought in said petition be denied.

—, Attorney for said Heir at Law.

§ 187. [1541.] Who may be Examined. — The executor, administrator, and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the court or judge, in the same manner and with like effect as in other cases.

Arizona. — Same. Rev. Stats., sec. 1150.

Idaho. — Same. Rev. Stats., sec. 5509.

Montana. — Same. Comp. Stats., p. 323, sec. 191.

Nevada. — Same. Gen. Stats., sec. 2829.

Utah. — Same. Comp. Laws, sec. 4163.

Washington. — Same. Code Proc., sec. 1010

Wyoming. — Same. Laws 1890-91, p. 278, sec. 19.

§ 188. [1542.] To Sell Real Estate, or Part, when. — If it appears necessary to sell a part of the real estate, and that by a sale thereof the residue of the estate, real or personal, or some specific part thereof, would be greatly injured or diminished in value, or subjected to expense, or rendered unprofitable, or that after any such sale the residue would be so small in quantity or value, or would be of such a character with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interests of all concerned that the same should be sold, the court may authorize the sale of the whole estate, or of any part thereof, necessary and for the best interest of all concerned.

Arizona. — Same. Rev. Stats., sec. 1151.

Idaho. — Same. Rev. Stats., sec. 5510.

Montana. — Same. Comp. Stats., p. 123, sec. 192.

Nevada. — Same. Gen. Stats., sec. 2830.

Oregon. — “If, upon the hearing, the court find that it is necessary that the real property, or any portion thereof, should be sold, it shall make the order accordingly, and prescribe the terms thereof, whether of cash or credit, or both; and if the court find that such property cannot be divided without probable injury and loss to the estate, it may order that it, or any specific lot or portion thereof, shall be sold wholly, whether otherwise necessary or not.” Hill’s Laws, sec. 1149.

Utah. — Same as California. Comp. Laws, sec. 4164.

Washington. — Same as California. Code Proc., sec. 1011.

Wyoming. — Same as California, except the words "court or judge" are used in place of "judge." Laws 1890-91, p. 278, sec. 20.

§ 189. [1543.] **Order of Sale.** — If the court is satisfied, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary, for any of the causes mentioned in this article, or if such sale be assented to by all the persons interested, an order must be made to sell the whole, or so much and such parts, of the real estate described in the petition, as the court shall judge necessary or beneficial.

Arizona. — Same. Rev. Stats., sec. 1152.

Idaho. — Same. Rev. Stats., sec. 5511.

Montana. — Same. Comp. Stats., p. 323, sec. 193.

Nevada. — Same. Gen. Stats., sec. 2831.

Oregon. — Hill's Laws, sec. 1149, under last section.

Utah. — Same as California, with the following added: "*Provided*, no order of sale granted in pursuance of this chapter shall continue in force more than one year after granting the same, unless a sale has been made thereunder." Stats. 1890, pp. 4, 5, amending Comp. Laws, sec. 4165.

Washington. — Same, with the following added: "At either public or private sale." Code Proc., secs. 1012, 1175.

Wyoming. — Same as California. Laws 1890-91, p. 278, 279, sec. 21.

Order of sale need not recite the facts: See § 514, *post*.

Personal property. ordering sale of, or ordering sale of real estate: See § 270, *post*.

Order refusing to set aside order of sale not appealable: *In re Smith*, 51 Cal. 563.

The petition and subsequent proceedings must be participated in by all the executors who qualify, or the sale will be void: *Gregory v. McPherson*, 13 Cal. 562.

Courts of probate should refuse an order for the sale of real estate, where there has been such delay in making the application as to amount to laches: *In re Crosby*, 55 Cal. 574.

The authority of the court to order a probate sale of real property is derived from the statute, and can only be exercised in cases specially designated: *Haynes v. Meeks*,

20 Cal. 288; *Townsend v. Gordon*, 19 Cal. 189.

An order of sale of real property made by the court after notice to all the parties interested, as required by law, and after examination of the proofs presented, is an adjudication that the sale of the property described is necessary, and unless appealed from is conclusive and binding upon the administrator and all parties interested in the estate: *In re Sprigg*, 20 Cal. 121.

If an administrator procures an order of sale of real estate to pay a debt which he had previously paid with funds of the estate, it is not a fraud which will enable the order to be attacked in a collateral proceeding. Nor can such an order be set aside in a collateral proceeding on the ground that a small portion of such real estate would have been sufficient: *Boyd v. Blankman*, 29 Cal. 19.

An order of sale of real estate should not be made while the land is held adversely, or there is a cloud over its title affecting its value: *In re Ricard*, 57 Cal. 421.

After an order of sale has been made, the administrator may proceed at any time and sell under said order, unless said order has been revoked. There is no statute requiring the sale to be made within any given time after the order: *In re Montgomery*, 60 Cal. 645.

Where titles of real estate will be injuriously affected, courts should not be held to too great strictness in probate proceedings. A fair and liberal construction should be given to their acts: *Stuart v. Allen*, 16 Cal. 473.

A mistake will be presumed, rather than that the order of sale was made before the return day: *Russell v. Lewis*, 3 Or. 380.

An order of sale of realty to pay a legitimate claim cannot be refused because the grantee of an heir offered to pay the claim upon condition that said claim should be assigned to him: *Weill v. Clark*, 9 Or. 387.

No presumption will be indulged against the recitals of an order of sale; the burden of showing want of jurisdiction will be cast on him who disputes the truth of the recitals: *Russell v. Lewis*, 3 Or. 380.

The court should order a sale of so much of the real estate as will satisfy outstanding claims, when it appears that the personal property has been exhausted: *In re Houck*, Sup. Ct. Or., Feb. 29, 1888.

Whether findings are necessary upon probate orders of sale, *quære*: *In re Arguello*, 85 Cal. 151.

If the rules in reference to findings apply to probate orders of sale, yet the party alleging error in the failure of the court below to make such findings must affirmatively show, by the record, that the findings were not waived, otherwise the intendment in the supreme court, which is always in support of the judgment, must be that they were waived: *In re Arguello*, 85 Cal. 151.

§ 190. [1544.] What the Order of Sale must Contain.—The order of sale must describe the lands to be sold and the terms of sale, which may be for cash or on a credit not exceeding one year, payable in gross or in installments, and in such kind of money, with interest, as the court may direct. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court otherwise specially directs. If it appears that any part of such real estate has been devised, and not charged in such devise with the payment of debts or legacies, the court must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale; the court may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order, and as directed therein, he may be compelled

to sell by order of the court made on motion, after due notice, by any party interested.

Arizona. — Same. Rev. Stats., sec. 1153.

Idaho. — Same. Rev. Stats., sec. 5512.

Montana. — Same. Comp. Stats., p. 324, sec. 194.

Nevada. — Same. Gen. Stats.; sec. 2832.

Oregon. — "Upon the order being made, the executor or administrator shall sell the property therein specified, upon the terms therein directed, and in the manner herein otherwise provided. Such sale shall be made in the same manner as like property is sold on execution; *provided, however*, that the judge may, if thought best, order said property to be sold on the premises." Hill's Laws, sec. 1150.

Utah. — Same as California. Comp. Laws, sec. 4166.

Washington. — "The order shall specify the lands to be sold and the terms of sale, which may be either for cash or on credit, and not exceeding six months, as the court may direct. If it appear that any part of such real estate has been devised and not charged in such devise with the payment of debts, the court shall order that part descended to heirs to be sold before that so devised." Code Proc., sec. 1013.

"Real property belonging to the estates of decedents, minors, idiots, and insane persons may be sold at private sale according to the following provisions." Code Proc., sec. 1174.

Same as California, except that the third sentence is omitted, and the words "or guardian" added after the word "administrator," wherever it occurs. Code Proc., sec. 1176.

"In all other respects, such sale shall be governed by the laws of the state of Washington now in force governing the sale of real property belonging to such estates." Code Proc., sec. 1183.

The act of the state of Washington, entitled "An act relating to private sales of real property belonging to estates of decedents, minors, and insane persons," being Code of Procedure, secs. 1174-1183, inclusive, relate to public as well as private sales. These sections may be found under §§ 189-199 of this work. See article 2, section 19, of the Washington constitution, as to the relation of the title of the act and as to its application.

Wyoming. — Same as California, except that, in the first sentence, the words "and in such kind of money, with interest," are omitted, and the words "or judge" are inserted after "court" in all places where it occurs but the third sentence. Laws 1890-91, p. 279, sec. 22.

It is the better practice for the court, in all cases where there are several distinct parcels of property, to insert in its order a direction that the sale cease when the amount required has been obtained; but the omission of such a direction does not invalidate the order or the sales made in pursuance of it: *In re Spriggs*, 20 Cal. 121.

The fact that order of sale pro-

vides sale shall cease when the amount required to be raised has been obtained does not render the order void when the property consists of several lots or parcels: *Richardson v. Butler*, 82 Cal. 174.

The order must itself sufficiently describe the land ordered sold. The description cannot be helped out by referring to any extraneous matter:

Hill v. Wall, 66 Cal. 130; *Crosby v. Public Sale—Private Sale: In Dowd*, 61 Cal. 557. See *Sepulveda v. re Dorsey*, 75 Cal. 258. *Baugh*, 74 Cal. 468.

Form No. 138.—Order of Sale of Real Estate.

[Title of Court and Estate.]

—, the administrator of the estate of —, deceased, having on the — day of —, A. D. 18—, presented his verified petition praying for an order to sell so much and such parts of the real estate belonging to the estate of said deceased as this court should judge necessary or beneficial, and the matter coming on regularly for hearing this day upon proof to the satisfaction of this court of the due publication of a copy of the order to show cause, for four successive weeks, before said hearing, in the Weekly Bee, a newspaper printed and published in said county of —, as directed by this court and according to law, this court heard and examined the proofs and allegations of said petitioner, and on such hearing, and after a full examination, it appearing to the satisfaction of this court that it is necessary that a portion of the real estate of the deceased be sold, in order that the proceeds may be applied to the payment of the debts outstanding against the deceased, and the debts, expenses, and charges of the administration; that it is for the best interest of the estate and of all the parties interested therein that that part of the real estate of decedent should be sold which is herein described,¹ and it further appearing that all the proceedings upon said application have been in all respects strictly conducted in accordance with law;—

It is therefore ordered, adjudged, and decreed that the said —, the administrator of said estate, be and he is hereby authorized to sell the following described real estate belonging to said estate (here insert description), at public auction (or “private sale,” or “either public or private sale, as said administrator shall judge to be most beneficial for said estate, pursuant to the prayer of said petition”), to the highest bidder, upon the following terms, to wit, for cash, gold coin of the United States,

¹ When, in the opinion of the court, it would benefit the estate to sell the realty at private sale (Code Civ. Proc., sec. 1544, *supra*), here insert the following: “That a private sale of said real property would benefit the estate.”

ten per cent of the bid payable at the time of sale, and balance upon confirmation by this court.¹

Dated, —, 18—. —, Judge of the — Court.

§ 191. [1545.] Interested Persons may Apply for Order.—If the executor or administrator neglects to apply for an order of sale when it is necessary, any person may make application therefor, in the same manner as the executor or administrator, and notice thereof must be given to the executor or administrator, before the hearing. The petition of such applicant must contain as many of the matters set forth in section fifteen hundred and thirty-seven,² as he can ascertain, and the decree of sale must fix the period of time within which the executor or administrator must make the sale.

Arizona.—Same. Rev. Stats., sec. 1154.

Idaho.—Same. Rev. Stats., sec. 5513.

“Upon making the order mentioned in the last section, a certified copy of the order of sale must be delivered by the court or the clerk to the executor or administrator, who is thereupon authorized and required to sell the real estate as directed.” Rev. Stats., sec. 5514.

Montana.—Same. Comp. Stats., p. 324, sec. 195.

Nevada.—Same. Gen. Stats., sec. 2833. Same as Idaho, Rev. Stats., sec. 5514, *supra*. Gen. Stats., sec. 2834.

Utah.—Same. Comp. Laws, sec. 4167.

Washington.—Same; last sentence omitted. Code Proc., sec. 1014. Same as Idaho, Rev. Stats., sec. 5514, *supra*, except that “a certified copy of,” and also the words “and required,” are omitted. Code Proc., sec. 1015.

Wyoming.—Same as California. Laws 1890-81, p. 279, sec. 23.

The term used in the above section, “any person,” is quite general, but it has been held, in *Garwood v. Garwood*, 29 Cal. 519, that “the first duty cast upon the court is to determine whether such person has any interest whatever in the subject-matter,” and if not, that he must be excluded from further participation in the proceedings.

The court may require executor to proceed under a former order of sale; such order to proceed is not appealable: *In re Martin*, 56 Cal. 208.

Where petition for sale of real estate of decedent, presented by a creditor of the executor whose claim has been allowed by the court, states sufficient facts to justify the sale, and the petitioner introduces evidence tending to prove every material allegation of the petition, it is error to

¹ When the original bond of administrator is insufficient (Code Civ. Proc., sec. 1389, § 72, *ante*), add the following: “And it is further ordered that before making such sale, said administrator execute an additional bond in the penal sum of — dollars, conditioned that the said administrator shall faithfully execute the duties of the trust according to law.”

² Sec. 183, *ante*.

grant a nonsuit on motion of the devisees: *In re Coutts*, 87 Cal. 480.

A claimant for services rendered to the estate during administration, whose claim has been allowed by the court as a proper expense of administration, may apply for a sale of the real estate to pay his claim, if the executor has not funds sufficient to pay it, and neglects to apply for the order of sale: *In re Coutts*, 87 Cal. 480.

Creditors—Expenses of Administration.—Sections 1536 and 1545 of the California Code of Civil Procedure are intended to afford creditors of the executor, as well as creditors of the de-

cedent, the means of securing payment of their claims against the estate, and contemplate expenses of administration which the executor neglects or refuses to pay: *In re Coutts*, 87 Cal. 480.

Allowance by court of a claim for services rendered to an executor as part of the expenses of administration included in his account is conclusive against all parties interested, except those laboring under disability, if no appeal is taken from the order settling the account, and cannot be questioned by the devisees upon a petition for the sale of realty to pay the claim: *In re Coutts*, 87 Cal. 480.

Section 1546 repealed. Cal. Stats. 1873-74, p. 371.]

§ 192. [1547.] Notice of Sale.—When a sale is ordered, and is to be made at public auction, notice of the time and place of sale must be posted in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court may direct, for three weeks successively next before the sale. The lands and tenements to be sold must be described with common certainty in the notice.

Arizona.—Same. Rev. Stats., sec. 1155.

Idaho.—Same. Rev. Stats., sec. 5515.

Montana.—Same. Comp. Stats., p. 324, sec. 196.

Nevada.—Same. Gen. Stats., sec. 2835.

Oregon.—See Hill's Laws, sec. 1150, under § 190, *ante*.

Utah.—Same as California. Comp. Laws, sec. 4861.

Washington.—“When a sale is ordered, notice of the time and place of sale shall be posted in three of the most public places in the county where the land is situated, at least twenty days before the day of sale, and shall be published in some newspaper of said county, if any there be, and if not, in some newspaper of this state, in general circulation in said county, for three successive weeks next before such sale, in which notice the lands and tenements shall be described with proper certainty.” Code Proc., sec. 1016.

In re Osgood, Myr. Prob. 153.

Notice of sale of real estate is sufficient if directed by the court to be made once a week for three successive weeks: *In re Cunningham*, 73 Cal. 558.

Publication need not be for four successive weeks next preceding the

sale. It is sufficient if it be made for four weeks successively at some time prior to the sale: *Walker v. Goldsmith*, 14 Or. 125.

Probate sale of real estate is invalid if the notice is not properly given: *Gager v. Henry*, 5 Saw. 237.

Form No. 139.—Notice of Sale of Real Estate at Public Auction.

Notice is hereby given, that in pursuance of an order of sale made and entered by the — court of the — county of —, state of —, on the — day of —, A. D. 18—, in the matter of the estate of —, deceased, the undersigned, administrator of said estate will sell at public auction, subject to confirmation by said court, the following described real property (or mines, etc.), (here insert description); said sale will be made on the — day of —, A. D. 18—, at — o'clock, — M., at the court-house door, in said — county and state; terms of sale (here insert said terms fully).

—, Administrator of the Estate of —, Deceased.

Dated —, 18—.

§ 193. [1548.] Time and Place.—Sales at public auction must be made in the county where the land is situated; but when the land is situated in two or more counties, it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed.

Arizona.—Same. Rev. Stats., sec. 1156.

Idaho.—Same. Rev. Stats., sec. 5516.

Montana.—Same. Comp. Stats., p. 324, sec. 197.

Nevada.—Same, to the words "and must"; balance omitted. Gen. Stats., sec. 2836.

Utah.—Same. Comp. Laws, sec. 4169.

Washington.—“Such sale shall be in the county where the lands are situated, at public auction, between the hours of ten o'clock in the morning and the setting of the sun the same day; but if the executor or administrator shall deem it for the interest of all concerned that the sale should be postponed, he may adjourn it for any time not exceeding fourteen days.” Code Proc., sec. 1017.

Wyoming.—Same as California. Laws 1890-91, p. 279, sec. 24.

Postponement: See § 202, *post*.

Notice of: See § 203, *post*.

§ 194. [1549.] Private Sale of Real Estate.—When a sale of real estate is ordered to be made at private sale, notice of the sale must be posted up in three of the most public places

in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, if none, then in such paper as the court, or a judge thereof, may direct, for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice; and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the clerk of the court to which the return of sale must be made, at any time after the first publication of the notice, and before the making of the sale. If it be shown that it will be for the best interest of the estate, the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen but not less than eight days from the first publication of the notice, in which case the notice of sale and the sale may be made to correspond with such order.

Arizona. — Same, except order of publication must be made by court. Rev. Stats., sec. 1157.

Idaho. — Same as Arizona. Rev. Stats., sec. 5517.

Montana. — Same as Arizona. Comp. Stats., p. 325, sec. 198.

Nevada. — Same as the first sentence of the California section, except as to time, which is three weeks. Gen. Stats., sec. 2835.

Utah. — Same as California, except that the following is omitted: "Or may be filed in the office of the clerk of the court to which the return of sale must be made"; and this is added: "*Provided*, that when a sale of the whole or any part of the real estate is ordered to be made, and it shall appear from the inventory returned that the whole of said estate does not exceed the sum of one thousand dollars, the publication of the notice in a newspaper as provided in this section may be dispensed with." Comp. Laws, sec. 4170.

Washington. — Same as California. Code Proc., sec. 1177.

Wyoming. — "When a sale of real estate is ordered to be made at private sale, it shall not in any case be sold for less than its appraised value, and no such sale shall be made or confirmed unless such real estate has been appraised within three months of the time of such sale. If it has not been so appraised, or if the court or judge is satisfied that the appraisement is too high

or too low, appraisers must be appointed, and they must make an appraisement thereof in the same manner as in the case of an original appraisement of an estate. This may be done at any time before the sale or confirmation thereof." Laws 1890-91, p. 279, sec. 25.

In re Dorsey, 75 Cal. 258.

The validity of statutory proceedings to pass title to the real estate of a decedent depends upon a substantial compliance with the law; the court cannot, by construction, ingraft upon the statute a new or additional provision not contained therein, in order to declare the proceedings invalid: *In re O'Sullivan*, 84 Cal. 444.

Publication of notice of a pri-

vate sale must be for two weeks successively next before the day of sale, and as often during the prescribed period as the paper is regularly issued; and such publication, if in a weekly newspaper, is not required to be made on or including the day of sale: *In re O'Sullivan*, 84 Cal. 444.

Purchaser is bound by written bid: *In re Otis*, Myr. Prob. 222.

Form No. 140. — Notice of Sale of Real Estate at Private Sale.

Under authority of an order of sale granted by the — court of the — county of —, state of —, dated —, 18—, I will sell at private sale the following described real estate (here insert description). The sale will be made on or after July 3, 1886, and bids will be received at the office of John J. West, 728 J Street, Sacramento City, state of —. Terms of sale (here insert said terms fully).

—, Administrator of the Estate of —, Deceased.

Dated —, 18—.

§ 195. [1550.] Ninety per Cent of Appraised Value must be Offered. — No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof.

Arizona. — Same. Rev. Stats., sec. 1158.

Idaho. — Same. Rev. Stats., sec. 5518.

Montana. — Same. Comp. Stats., p. 325, sec. 199.

Nevada. — Same; last sentence omitted. Gen. Stats., sec. 2836.

Utah. — Same as California. Comp. Laws, sec. 4171.

Washington. — Same. Code Proc., sec. 1178.

Wyoming. — See last section.

The sufficiency of appraisal in form to give information to the court to enable it to exercise its judgment in confirming the sale is not open to be controverted upon a collateral attack: *Smith v. Biscailuz*, 83 Cal. 344.

§ 196. [1551.] Purchase-money on Credit, how Secured. — The executor or administrator must, when the sale is made upon a credit, take the notes of the purchaser for the purchase-money, with a mortgage on the property to secure their payment.

Arizona. — Same. Rev. Stats., sec. 1159.

Idaho. — Same. Rev. Stats., sec. 5519.

Montana. — Same. Comp. Stats., p. 326, sec. 200.

Nevada. — Same. Gen. Stats., sec. 2837.

Oregon. — Same. Hill's Laws, sec. 1150.

Utah. — Same, with the following added: "Provided, that at least ten per cent of the purchase-money shall be paid at time of sale." Comp. Laws, sec. 4172.

Washington. — Same, except the words "or guardian" are added after the word "administrator." Comp. Laws, secs. 1179, 1019.

Wyoming. — Same as California. Laws 1890-91, p. 280, sec. 26.

Where the terms of sale were one half of the purchase-money, cash, and the remainder in ninety days, with interest from date of sale at the rate of one per cent per month, and the purchaser elected to pay the whole amount down, it was held that the purchaser is entitled to a reduction for the interest on one half of the purchase-money: *Halleck v. Guy*, 9 Cal. 181.

§ 197. [1552.] When Resale may be Ordered. — The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court, which must be filed in the office of the clerk, at any time subsequent to the sale. A hearing upon the return of the proceedings may be asked for in the return, or by petition subsequently, and thereupon the clerk must fix the day for the hearing, of which notice of at least ten days must be given by the clerk, by notices posted in three public places in the county, or by publication in a newspaper, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a

sum exceeding such bid at least ten per cent, exclusive of [the expenses of] a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place; if an offer ten per cent more in amount than that named in the return be made to the court in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale. [Amendment approved March 31, 1891. Cal. Stats. 1891, p. 427.]

Arizona. — The first sentence of the section adds the word "probate" before the word "court," and the phrase "either in term or vacation" to the end of sentence; then follows: "If the sale is made at public auction, and the returns made and filed on or before the first day of the next term thereafter, no notice is required of such return or of the hearing thereof, but the hearing may be made upon the first day of the term, or any subsequent day to which the same may be postponed. If the sale be not made at public auction, or if made at public auction, a hearing upon the return of proceedings be asked for in the return, or is brought on for a hearing upon a day before the first day of the next term thereafter, or upon any other day than the first day of the next term after such sale." The balance of section same. Rev. Stats., sec. 1160.

Idaho. — Same. Rev. Stats., sec. 5520.

Montana. — Same as Arizona, except that the phrase "or upon any other day than the first day of the next term after such sale" is omitted. Comp. Stats., p. 326, sec. 201.

Nevada. — The latter part of section same as last sentence of California section; first part as follows: "The executor or administrator making any sale of any real estate shall, at the next term of the court thereafter, or at any subsequent sitting of the court after making any such sale, upon notice of at least ten days, to be given in such manner as the court or judge may direct, make a return of his proceedings to the probate judge." Gen. Stats., sec. 2838.

Oregon. — "At the term of court next following the sale of real property, the executor or administrator shall make a return of his proceedings concerning such sale. At such term, any of the persons cited to appear on the application for the order of sale may file his objections to the confirmation of such sale." Hill's Laws, sec. 1151.

"Upon the hearing, the court shall confirm the sale, and decree that the executor or administrator make a conveyance to the purchaser, unless it appear that there were irregularities in the sale, or that the sum bidden for the property is disproportionate to the value thereof, and that a sum exceeding such bid at least ten per centum, exclusive of the expenses of a new sale, may be obtained therefor, in either of which cases the court shall make an order vacating the sale, and directing that the property be resold; and upon such second sale, the property, on any specific portion or lot thereof, ordered

to be resold shall be sold as if no previous sale had taken place. In case no objections are made to the confirmation of the sale as provided in section 1151 [*supra*], the court shall nevertheless examine the proceedings concerning such sale, and if it appear proper, may make the order of resale provided for in this section, in the same manner and with like effect as if objections had been filed thereto." Hill's Laws, sec. 1152.

Utah. — Same, except that the return must be made within thirty days. Comp. Laws, sec. 4173.

Washington. — "The executor or administrator making any sale of real estate shall, within ten days thereafter, make a return of his proceedings to the court, which shall examine the same, and if the court shall be of opinion that the proceedings were unfair, or that the sum bidden is disproportionate to the value, and that a sum exceeding such bid at least ten per cent, exclusive of expenses of a new sale, may be obtained, the order of sale shall be vacated [and] another sale shall be ordered. On a resale, notice shall be given, and the sale shall be conducted in all respects as if no previous sale had been made." Code Proc., sec. 1020.

Same as California, except that "the court or judge must fix the day for the hearing," or notice may be given "by publication in a newspaper," "or by both posting and publishing," as the court or judge shall direct; and after the word "administrator" the words "or guardian" are added. Code Proc., sec. 1180.

Wyoming. — Same as California, except that these words are added to the first sentence: "And before the next term thereof." The words "court or judge" are inserted in lieu of the word "clerk," in the second sentence, and all after the word "hearing" is omitted from said sentence. In the third sentence, after the word "bid," the words "or received" are interpolated. Laws 1890-91, p. 280, sec. 27.

The return of sale of real property must be made under oath: *Dennis v. Winter*, 63 Cal. 16. See also § 169, *ante*.

Notice, contents: See § 322, *post*.

Sale, Powers and Trusts for: See § 225, *post*.

Court may Appoint Attorney: See § 328, *post*.

If the court make an order confirming the sale, in the absence of an order fixing the time for hearing the report of sale, and of the notice prescribed by the above section, it is void for want of jurisdiction, and the court may set it aside on its own motion: *Perkins v. Gridley*, 50 Cal. 97.

The provisions of the statute allowing objections to be made to the sale, and requiring for its efficacy a confirmation by the court, are intended to secure such an execution of the order of sale that a just and fair price may be obtained for the property.

This authority is limited to such a supervision and control that this end may be effected: *In re Spriggs*, 20 Cal. 121.

If the court direct a resale of real property which had been previously sold and confirmed, the person to whom the confirmation was made may appeal from the order: *In re Boland*, 55 Cal. 310.

Where there is a new bid of more than ten per cent advance upon the bid at the sale offered to the court, and it refuses to confirm the sale, it may continue the matter, and may at a subsequent time accept such new bid, or it may order a resale. If the order refusing to confirm the sale inadvertently declares the sale void, the court may nevertheless, at a subsequent time, accept the new bid: *Griffin v. Warner*, 48 Cal. 383.

The substitution of another bidder for one who fails to comply

with the terms of the sale at an executor's sale cannot affect the validity of the sale. Validity is given to the purchase by the order directing the sale and the order confirming it: *In re Durham*, 49 Cal. 490; *Halleck v. Guy*, 9 Cal. 181.

A contract was entered into between the executrix and an heir of deceased as one party, and another person as a second party, that the latter shall procure a purchaser who will raise the purchase price of real property of an estate sold at least ten per cent, at the hearing of the confirmation, and that said second party should receive all of said sum in excess of twenty-nine thousand five hundred dollars, which would leave for the benefit of the estate about a five-per cent advance on the amount for which

the property was sold. At the confirmation of said sale bids were received, and said property was confirmed at the price of thirty-seven thousand dollars. The said second party sued said first party to recover the difference between said twenty-nine thousand five hundred dollars and thirty-seven thousand dollars, and it was held that even if the agreement be treated as an individual contract of said first party, it is contrary to the provisions of the statute, is against the policy of the law, and is invalid: *Danielwitz v. Sheppard*, 62 Cal. 339.

The finding of the court, in the order confirming the sale, that notice of the sale is posted in three public places, is conclusive as against a collateral attack: *Richardson v. Butler*, 82 Cal. 174.

Form No. 141.—Return, Account of Sales, and Petition for an Order Confirming Sale of Real Estate.

[Caption, Form No. 1, § 5, *ante*.]

1. —, administrator (or executor) of the estate of —, deceased, on this — day of —, A. D. 18—, respectfully makes the following return of his proceedings under the order of this court heretofore made and entered herein, authorizing and directing a sale of the real estate belonging to the estate of said deceased, and reports as follows, to wit: —

2. That he caused to be posted and published in the manner provided by law due and legal notice of the time and place of holding the sale authorized by said order;

3. That at the time and place of holding such sale he caused to be sold in two parcels (judging it to be most beneficial for said estate), at public auction, to the highest bidder, for cash, subject to confirmation by this court, the real estate directed in said order to be sold, and described in said notice;

4. That parcel No. 1 was sold to —, for the sum of \$—, and is described as follows (here insert description);

5. That parcel No. 2 was sold to —, etc.;

6. That said sale was legally made and fairly conducted; that the sum bid is not disproportionate to the value of the property sold; that a sum exceeding said bid at least ten per cent, exclusive of the expenses of a new sale, cannot be obtained;

7. That the exhibits — annexed hereto are hereby referred to, and made a part of this return;

8. That the costs and expenses of said sale are the sum of \$—, as shown in said exhibit —;

Wherefore said administrator (or executor) prays that the court fix a day for the hearing of this return of sale of real estate, and that at such hearing, after the proofs are made, that this honorable court will make an order confirming said sales, and directing the execution of conveyances to the purchasers.

—, Administrator of the Estate of —, Deceased.

—, Attorney for Administrator.

(Verification, Form No. 55, § 80, *ante*.)

Form No. 142.—Affidavit of Posting Notices of Sale.

EXHIBIT "A."

State of —, }
—, County of — } ss.

—, being duly sworn, deposes and says that on the — day of —, A. D. 18—, he posted exact and true copies of the annexed notice of the time and place of the sale mentioned in said notice in three of the most public places in the — county of —, state of —, to wit, one copy of said notice at the door of the court-house of said — county, one at the United States post-office in the city of —, and one at the United States land-office in said city; that the following is a copy of said notice (here insert said notice). —

Subscribed and sworn to before me this — day of —, A. D. 18—. —, Notary Public.

Form No. 143.—Affidavit of Publication of Notice of Sale.

EXHIBIT "B."

State of —,
County of —.

—, being duly sworn, on his oath, deposes and says that he is the printer (or foreman or principal clerk) of the Daily Bee, a newspaper of general circulation printed and published in the said county of —, state of —; that the following notice of sale was published for three weeks, successively, next before

the sale mentioned therein in said newspaper, commencing on on the — day of —, A. D. 18—; said notice is as follows (here insert copy of notice).

Subscribed and sworn to before me this — day of —, A. D. 18—. —, Notary Public.

NOTE. — If the paper in which the foregoing notice is published is a weekly, it should appear in said paper four times, and if it is a daily, it should appear each day from the commencement of the publication up to and including the day of sale, which should be at least twenty-two days from the first publication.

Form No. 144.—Affidavit of Auctioneer.

EXHIBIT "C."

State of —, }
County of — }

— being duly sworn, deposes and says that he is a licensed auctioneer of the county of —, state of —; that as such auctioneer, and under the instructions and by the authority of —, the administrator of the estate of —, deceased, he, at the time and place mentioned in the notice of sale, to wit, on the — day of — A. D. 18—, at —, in the county —, state of —, offered for sale, at public auction, as parcel No. 1, the following described real property (here insert description of parcel No. 1), that said parcel No. 1 was sold to — for the sum of \$—, he being the highest and best bidder therefor, and that sum being the highest and best bid for the same; that at the same time and place he offered for sale, at public auction, as parcel No. 2, the following described real property (here insert description of parcel No. 2) that said parcel No. 2 was sold to — for the sum of \$—, he being the highest and best bidder therefor, and that sum being the highest and best bid for the same; that the account of sales of said property at said auction is as follows:—

Gross proceeds of sale of said realty.....\$13,600

CHARGES.

Advertising in "Daily Bee".....\$30

Posting notices..... 5

Commissions, as per agreement.....200 235

Net proceeds.....\$13,365

—, Auctioneer.

Subscribed and sworn to before me this — day of —, A. D. 18—. —, Notary Public.

NOTE. — In case the sale was private, omit the affidavit of the auctioneer, but an account of sales signed by the administrator (or executor) should accompany the return and the bids, which must be in writing, and must be annexed to the return as exhibits.

Form No. 145.—Order Fixing Day of Hearing Return of Sale of Real Estate.

[Title of Court and Estate.]

—, the administratrix of the estate of —, deceased, having this day made a return to this court of her proceedings under the order of sale of real estate made by this court on the — day of —, A. D. 18—, and filed the said return herein, and a hearing upon the said return of proceedings being asked for in the said return, —

It is ordered and directed that —, the — day of —, A. D. 18—, at the hour of ten o'clock, A. M., at the court-room of this court, be and the same is hereby fixed for the hearing upon said return, and that notice of at least ten days be given thereof by the clerk by notices posted in three public places in said — county, and that said notices briefly indicate the land sold and the sum for which it was sold, and refer to the return for further particulars. —, Judge of the — Court.

Dated —, 18—.

Form No. 146.—Notice of Hearing Return of Sale of Real Estate.

[Title of Court and Estate.]

Pursuant to an order of this court made the — day of —, 18—, notice is hereby given that —, the — day of —, A. D. 18—, at ten o'clock, A. M., of that day, and the court-room of this court, at the court-house in the city of —, have been appointed as the time and place for a hearing upon the return of the proceedings of —, executor (administrator) of said estate, under an order of this court dated the — day of —, A. D. 18—, authorizing the sale of certain real estate, situate, lying, and being in the county of —, state of —, and described as follows, to wit (here insert description of

premises), which said executor (administrator) has sold at public (private) sale for the sum of — dollars to the person named in his said return, to which reference is made for further particulars, and notice is hereby given that any person interested in the said estate may appear at the time and place above mentioned, and file written objections to the confirmation of the said sale, and may be heard and may produce witnesses in support of his objections.

—, Clerk.

By —, Deputy Clerk.

Form No. 147.— Offer of Ten per Cent Advance on Sale of Real Estate.

[Title of Court and Estate.]

Now, on this day, the matter of the confirmation of the sale of the real property hereinafter described coming on for hearing, the undersigned hereby offers therefor the sum of \$—, which is an advance of ten per cent upon the price for which said property was sold by the administrator of said estate to —. The said property is described as follows, to wit (here insert description). Respectfully, —.

Dated —, 18—.

§ 198. [1553.] Objections.— When return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon, when the return is heard by the court or judge, and may produce witnesses in support of his objections.

Arizona.— Same. Rev. Stats., sec. 1161.

Idaho.— Same. Rev. Stats., sec. 5521.

Montana.— Same. Comp. Stats., p. 326, sec. 202.

Nevada.— Same. Gen. Stats., sec. 2839.

Oregon.— Hill's Laws, sec. 1151, under § 197, *ante*.

Utah.— Same. Comp. Laws, sec. 4174.

Washington.— Same. Code Proc., secs. 1021, 1181.

Wyoming.— Same. Laws 1890-91, p. 280, sec. 28.

An objection that the sureties on the additional bond were insolvent should be allowed: *In re Arguello*, 50 Cal. 308.

Objections to confirmation of sale may be filed by any person interested in the estate, and he may produce evidence at hearing to sup-

port the same: *Broadwater v. Richards*, 4 Mont. 80.

Objections to the confirmation of sale of a decedent's real estate can be made only by parties interested in the estate: *Terry v. Clothier*, 1 Wash. 475.

Form No. 148. — Objections to Confirmation of Sale of Real Estate.

[Title of Court and Estate.]

Now comes —, and in opposition to the confirmation of the sale of real estate heretofore made herein, shows to this court and alleges as follows, to wit: —

1. That he is one of the heirs at law of said deceased;

2. That the sale mentioned in the return of sale of —, the administrator of the above-entitled estate, filed herein on the — day of —, A. D. 18—, was not legally made nor fairly conducted in this, that the auctioneer refused to accept the bid of one —, for parcel 1, as described in said return of sale, to which reference is hereby made for a full description of said parcel 1; that said — offered for said parcel at said sale, and was willing to pay therefor, the sum of — dollars, but said auctioneer sold said property for a less sum, to wit, — dollars, to —, as shown by said return; that said — was a responsible and *bona fide* bidder for said parcel 1;

3. That the price for which parcel 2, mentioned in said return, reference to which is hereby made for a full description thereof, to wit, the sum of — dollars, is disproportionate to the value of the property sold, and a bid therefor of at least ten per cent more than the amount for which said parcel was sold, exclusive of the expenses of a new sale, can be obtained therefor;

4. That the notice of said sale was neither published nor posted as required by law;

Wherefore, contestant prays that said sale be rejected, and not confirmed by this court. —, Contestant.

—, Attorney for Contestant.

§ 199. [1554.] When Order of Confirmation to be Made. — If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in section 1552 be made and accepted by the court, the court must make an order confirming the sale, and directing conveyances to be executed. The sale,

from that time, is confirmed and valid, and a certified copy of the order confirming it and directing conveyances to be executed must be recorded in the office of the recorder of the county within which the land sold is situated. If, after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate.

For section 1552, see § 197, *ante*.

Arizona. — Same. Rev. Stats., sec. 1162.

Idaho. — Same. Rev. Stats., sec. 5522.

Montana. — Same. Comp. Stats., p. 326, sec. 203.

Nevada. — Same, except order of sale must also be recorded. Gen. Stats., sec. 2840.

Oregon. — Hill's Laws, sec. 1152, under § 197, *ante*.

Utah. — Same as California. Comp. Laws, sec. 4175.

Washington. — Same as California, to and including the word "valid"; balance omitted. Code Proc., sec. 1022. Same as first sentence of California section. Code Proc., sec. 1182.

Wyoming. — Same, except that, in the first sentence, after the word "bid," the words "or received" are inserted. The second sentence is omitted. In the third sentence, after the word "court," the words "or judge in vacation" are inserted. Laws 1890-91, p. 280, sec. 290.

Substitution of New Bidder: *Halleck v. Guy*, 9 Cal. 196.

Recording Order of Confirmation: See § 329, *post*.

An approval by the court of the executor's accounts charging himself with money, the proceeds of a sale of real estate, is not a confirmation of such sale, nor is a clause in a decree of distribution, confirming and approving all the acts of the executor, a confirmation of such sale: *In re Delaney*, 49 Cal. 76.

The provision of law concerning the confirmation of sales and the conveyance of the property sold, have effect only upon sales made under orders which the court had jurisdiction to make: *Gregory v. Taber*, 19 Cal. 397; *Gregory v. McPherson*, 13 Cal. 577.

If the court makes an order appointing a person administrator upon his giving a bond as required by law, and he does not give the bond, or

qualify, he does not become an administrator. If he acts as such, and procures an order of sale of real estate, and sells the real property belonging to the estate, such sale is void even though it has been confirmed by the court: *Pryor v. Downey*, 50 Cal. 388.

Mere technical objections will not be allowed to overturn a title to realty, honestly acquired under a probate sale, where there is no pretense that the sale was in fact fraudulent, or without adequate consideration, or in any way unfair: *Richardson v. Butler*, 82 Cal. 174.

If the court makes an order confirming a sale without giving legal notice of the hearing of the report of sale, the order is void, and may be set aside for want of jurisdiction: *Halleck v. Guy*, 9 Cal. 181; *In re Durham*, 49 Cal. 490.

If the executor agree to sell real estate in consideration that the

purchaser will give an agreed sum at the sale, and then petitions the court to confirm the agreement or to make an order of sale, and the court orders a public sale, at which the purchaser buys at the agreed price, that being the highest bid offered, the transaction is valid: *Stuart v. Allen*, 16 Cal. 474.

No title passes until the sale is reported and confirmed by the court. The report of sale must be made under oath. A recital in the order of confirmation that it was so made is conclusive against a collateral attack: *Dennis v. Winter*, 63 Cal. 16.

The legislature has no power to make valid, by a retroactive statute, that which is inherently a nullity, nor render a sale of property efficacious, when made in a manner which it had no power to authorize; but when the sale is void, merely in consequence of a failure to comply with the conditions upon which the power to make it was delegated by the legislature, and which it could have dispensed with in the beginning, and the sale been valid, it can, by the adoption of such a statute, legalize it: *Mitchell v. Campbell*, 19 Or. 198.

Form No. 149. Order Confirming Sale of Real Estate.

[Title of Court and Estate.]

—, the administrator of the estate of —, deceased, having made to this court and filed in the office of the clerk thereof a return of the sale of the real estate hereinafter described, verified by affidavit, and the matter, after due notice given, as required by law, and an order of this court made and entered herein on the — day of —, A. D. 18—, coming on regularly to be heard this — day of —, A. D. 18—, and upon the proofs adduced, it appearing to the satisfaction of this court that, as required by law, said administrator caused due and legal notice of the sale of said real estate to be posted in three of the most public places in the county of —, state of —, in which said county said real estate is situated, and to be published in the Daily Record-Union, a newspaper printed and published in said county (or if the sale was made at public auction, "three weeks") for two weeks successively next before the day on or after which the sale was to be made, in which notice the real estate to be sold was described with common certainty; that — having bid the sum of — dollars for said real estate, said administrator, on the — day of —, A. D. 18—, accepted said bid, and sold said real estate to said — for the said sum of — dollars; that said sale was legally made and fairly conducted; that — dollars, the sum bid, is not disproportionate to the value of the property sold; that a sum exceeding said bid at least ten per cent, exclusive of the expenses of a new sale, cannot be obtained; that said real estate

has been appraised within one year of the time of said sale;¹ that the sum of — dollars, offered by said —, is more than ninety per cent of the appraised value of said real estate;² and that the said administrator in all things proceeded and managed such sale as by the statute in such case made and provided; —

It is hereby ordered, adjudged, and decreed that the said sale of the real estate hereinafter described be and the same is hereby confirmed, approved, and declared valid, and the proper and legal conveyances of said real estate are hereby directed to be executed to said — by said administrator; said real estate is described as follows, to wit (here insert description).

Dated —, 18—.

—, Judge of the — Court.

Form No. 150.—Order Confirming Sale of Real Estate to Bidder in Open Court.

[Title of Court and Estate.]

—, the administratrix of the estate of —, deceased, having made to this court and filed in the office of the clerk thereof a return of the sale of certain real estate belonging to the estate of said decedent, verified by affidavit, and the matter, after due notice given, as required by law, and an order of this court entered —, 18—, coming on regularly to be heard this — day of —, 18—, and upon the proofs adduced, it duly appearing to the satisfaction of this court, —

That, as required by law, said administratrix caused due and legal notice of the sale of said real estate to be posted up in three of the most public places in said county of —, in which the real estate ordered to be sold is situated, and to be published in the Daily Bee, a newspaper printed and published in the same county, for two weeks successively next before the day on or after which the sale was to be made, in which notice the real estate to be sold was described with common certainty; that —, having bid the sum of nine hundred dollars for said real estate, said administratrix, on the — day of —, 18—, accepted said bid, and sold said real estate to said — for the

¹ Omit this recital when the sale was by public auction.

² Omit this recital when the sale was by public auction.

said sum of nine hundred dollars; that the said sale was legally made and fairly conducted;

And now, on this day, after due and legal notice of this hearing had been given, and the return of sale of said real estate coming on for hearing, — comes in open court, and bids and in writing offers the sum of \$990, being ten per cent in advance of the bid received and reported of — for the said real estate, and no other person bidding or being willing to pay any further or greater sum, the said bid of said —, for the said real estate situated in the said county of —, state of —, and particularly described as follows: The north half of the east quarter of lot No. 2, in the square or block bounded by L and M and Third and Fourth streets, in the city of Sacramento, as laid down on the official map thereof, and the improvements thereon, — is hereby accepted, and the sale of said property to said — for said sum of \$990 is hereby ordered, approved, and confirmed; and the proper and legal conveyances of said real estate are hereby directed to be executed to said — by said administratrix.

Dated —, 18—.

—, Judge of the — Court.

Form No. 151. — Order Confirming Sale of Real Estate Made under Authority Given by Will.

[Title of Court and Estate.]

—, the executor of the estate of —, deceased, having made to this court and filed in the office of the clerk thereof a return of the sale of certain real estate belonging to the estate of said decedent, verified by affidavit, and the matter coming on regularly to be heard this day, and it appearing to the satisfaction of the court that due and legal notice of such hearing has been given; that said sale was authorized by the will of decedent to be made without first procuring from this court an order of sale thereof; that said will has heretofore been admitted to probate in this court; that due and legal notice of the sale of said real estate was given as required by law; that said sale was legally made and fairly conducted; that the sum bid, to wit, the sum of — dollars, was not disproportionate to the value of the property sold, and that a bid exceeding said sum at least ten per cent, exclusive of the expenses of a new sale,

cannot be had; that — became the purchaser of said property at such sale, —

It is therefore ordered that said sale of the said property which is hereinafter described be and the same is hereby confirmed to —, said purchaser, and said executor is hereby directed to execute proper conveyances thereof to said —.

Dated —, 18—. —, Judge of the — Court.

Form No. 152. — Notice to Purchaser of Motion to Vacate Sale, etc., and for a Resale of Real Estate.

[Title of Court and Estate.]

To —.

Please take notice that on the — day of —, A. D. 18—, at the hour of — o'clock of said day, at the court-room of said court, at the county court-house of the above-named county, the administrator of the above-named estate will move the court to vacate and annul the sale heretofore made to you by said administrator of the following described real property of said estate, to wit (here insert description), and will also move said court to set aside, vacate, and annul the order confirming the sale of said property to you so far as said order relates to said property, on the ground that you have, up to the present time, failed, refused, and neglected to pay to said administrator the balance of the purchase price due from you to him for said property, and because you have refused to comply with the terms of said sale, and still continue to refuse, fail, and neglect to pay the same, or any part thereof, or to comply with said terms of sale in any manner. Said motion will be based upon the papers on file in the matter of the above-entitled estate and the orders of said court therein, and upon oral and documentary evidence to be introduced at the hearing of said motion.

Dated —, 18—. —, Attorney for Administrator.

Form No. 153. — Order for Resale on Neglect or Refusal of Purchaser to Comply with Terms of Sale.

[Title of Court and Estate.]

Now, on this — day of —, A. D. 18—, the motion of —, administrator of the estate of —, deceased, to annul and set aside the sale of certain real property of said estate, which is

hereinafter described, coming on regularly for hearing, and it appearing that due notice of this motion has been regularly served upon —, the person to whom said sale was made and to whom said sale was thereafter confirmed by the order of this court on the — day of —, A. D. 18—, and it appearing that said — has heretofore refused and neglected, and still does refuse and neglect, to comply with the terms of said sale in this (here state in what particular he has not complied with the terms of sale),—

It is therefore ordered that the sale of said property heretofore made to said — by said administrator be and the same is hereby vacated, set aside, and annulled, and that the order of this court, made and entered on the — day of —, A. D. 18—, approving the sales made by said administrator, so far as the same confirms the sale to said — of said real property, is vacated, set aside, and annulled;

The real property hereinbefore referred to is described as follows, to wit (here insert description);

And said administrator is hereby authorized, empowered, and directed to proceed under the order of sale heretofore made and entered by this court on the — day of —, A. D. 18—, and to do all things in the premises under said order as though said sale and the order confirming the same had not been made.

—, Judge of the — Court.

Dated —, 18—.

§ 200. [1555.] **Conveyances.** — Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were, at large, inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent in the premises at the time of his death; if, prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest

in the premises, other than, or in addition to, that of the decedent at the time of his death, such right, title, or interest also passes by such conveyances.

Arizona. — Same. Rev. Stats., sec. 1163.

Idaho. — Same. Rev. Stats., sec. 5523.

Montana. — Same. Comp. Stats., p. 327, sec. 204.

Nevada. — Same. Gen. Stats., sec. 2841.

Oregon. — "A conveyance executed by an executor or administrator shall set forth the date of the order directing the sale, and the book, number thereof, and page containing the same, and the date of the order confirming the sale and directing the conveyance, and the book, number thereof, and page containing the same, and the title of the court making such orders, and shall operate to convey all the estate, right, and interest of the testator or intestate in the premises at the time of his death." Hill's Laws, sec. 1153.

Utah. — Same as California. Comp. Laws, sec. 4176.

Washington. — "Such conveyances shall thereupon be executed to the purchaser by the executor or administrator. They shall refer to the original order authorizing a sale, and the order confirming the sale and directing the conveyance; and they shall be deemed to convey all the estate, rights, and interest of the testator or intestate at the time of his death." Code Proc., sec. 1023.

Wyoming. — Same, except that in the first sentence, after "court," the words "or judge" are added; and these words are omitted: "And to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume, and page of the record." Laws 1890-91, p. 281, sec. 30.

Probate sales convey only such title as the decedent had at the time of his death, and such as the estate may have subsequently acquired: *Meyers v. Farquarson*, 46 Cal. 200.

Possessory interest in public lands may descend among the effects of a deceased person, and may be conveyed under a probate sale to another: *Grorer v. Hawley*, 5 Cal. 486.

An administrator's deed cannot contain a warranty. The rule of *caveat emptor* applies: *Halleck v. Guy*, 9 Cal. 181.

Where the resignation of an administrator has been improperly

accepted, and the acceptance is voidable for error, but not void, the successor of the administrator so resigning, having sold lands under the order of court, it was held that the purchaser could maintain ejectment against a grantee of the heir. Whether the sale be void or voidable, the purchaser who has paid the debts of the estate should have a lien upon the property for his purchase-money: *Haynes v. Meeks*, 10 Cal. 110.

The court can compel the execution of a proper conveyance after confirmation of a probate sale: *In re Lewis*, 39 Cal. 306.

Form No. 154.—Deed of Administrator.

This indenture, made the — day of —, A. D. 18—, at the — county of —, state of —, by and between —, the duly appointed, qualified, and acting administrator of the estate of —, deceased, the party of the first part, and —, of the county of —, state of —, the party of the second part, witnesseth:—

That whereas, on the — day of —, A. D. 18—, the — court of the — county of —, state of —, made an order of sale authorizing the said party of the first part to sell certain real estate belonging to said estate, and which is situated in the said — county and state, and specified and particularly described in said order of sale, reference to which is hereby made;¹

And whereas, under and by virtue of said order of sale, said party of the first part, on the — day of —, A. D. 18—, sold said real estate, subject to confirmation by said — court, to said party of the second part, for the sum of — dollars;²

And whereas said court did, on the — day of —, A. D. 18—, make an order confirming said sale, and directing conveyances to be executed to the said party of the second part, a certified copy of which order of confirmation was recorded in the office of the county recorder of — county of —, in said state, on the — day of —, A. D. 18—, at 2:45 o'clock, P. M., in book — of Deeds, page —, and which said order of confirmation now on file and of record in said — court, and which said record thereof in said recorder's office, are hereby referred to,—³

Now, therefore, the said —, administrator of the estate of said —, deceased, the party of the first part, pursuant to the order last aforesaid of the said — court, for and in consideration of the said sum of — dollars, gold coin of the United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey, unto the said party of the second part, his heirs and assigns forever, all the right, title, interest, and estate of the said —, deceased, at the time of his death, and also all the right, title, and interest that the said estate, by operation of law or otherwise, may have acquired, other than or in addition to that of the said intestate at the time of his death, in and to all that certain real property situated in said — county of —, state of —, and particularly described as follows, to wit (here insert description);

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto

the said party of the second part, his heirs and assigns forever;

In witness whereof, the said party of the first part, administrator as aforesaid, has hereunto set his hand and seal the day and year first above written.

[SEAL] —, Administrator of the Estate of —, Deceased.

State of —;
—, County of — } ss.

On this — day of —, in the year one thousand eight hundred and eighty —, before me, —, a notary public in and for the said — county of —, state of —, personally appeared —, known to me to be the person whose name is subscribed to the within instrument as the administrator of the estate of —, deceased, and acknowledged to me that he, as such administrator, executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at the said — county of —, the day and year in this certificate first above written.

—, Notary Public.

Form No. 155.—Another Form of the Foregoing.

(Follow Form No. 154 to 1, and then continue as follows:)

And whereas, under and by virtue of said order of sale, said party of the first part, on the — day of —, A. D. 18—, sold said real estate, subject to confirmation by said — court, to —, for the sum of one thousand dollars;

And whereas, the return of sale of said real estate came on regularly for hearing in said court on the — day of —, A. D. 18—, and at said hearing —, the said party of the second part, made his written offer in due form, offering to give the sum of eleven hundred dollars for said real estate; and no other person bid or was willing to pay any further or greater sum;

And whereas said court did, on the — day of —, A. D. 18—, make an order accepting said written offer and confirming the sale of said property to —, and directing conveyances to be executed to him, a certified copy of which order of acceptance and confirmation was recorded in the office of the county

recorder of — county of —, state of —, on the — day of —, A. D. 18—, at 2:45 o'clock, P. M., in book — of Deeds, page —, which said order of acceptance and confirmation now on file and of record in said — court, and which said record thereof in said recorder's office are hereby referred to.

(Follow the remainder of Form No. 154 from 3.)

Form No. 156. — Another Form of Deed.

This indenture, made the — day of —, A. D. 18—, at the — county of —, state of —, by and between —, the duly appointed, qualified, and acting executor of the estate of —, deceased, the party of the first part, and —, of the said — county of —, state of —, the party of the second part, witnesseth:—

That whereas, on the — day of — A. D. 18—, the — court of the — county of —, state of —, made an order admitting a certain document to probate as the last will and testament of said —, deceased, which said order is hereby referred to and made a part of this indenture;

And whereas, by the terms of said last will and testament, reference to which is hereby made, the real estate hereinafter described was directed to be sold;

And whereas, under and by virtue of said authority contained in said last will and testament, said party of the first part, on the — day of —, A. D. 18—, sold said real estate, subject to confirmation by said — court, to said party of the second part, for the sum of — dollars.

(Follow the remainder of Form No. 154 from 2.)

§ 201. [1556.] Order of Confirmation, What to State.— Before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made.

Arizona.— Same. Rev. Stats., sec. 1164.

Idaho.— Same. Rev. Stats., sec. 5524.

Montana.— Same. Comp. Stats. p. 327, sec. 205.

Nevada.— Same. Gen. Stats., sec. 2842.

Utah.— Same. Comp. Laws, sec. 4177.

Washington.— Same. Code Proc., sec. 1024.

§ 202. [1557.] Sale may be Postponed.—If, at the time appointed for the sale, the executor or administrator deems it for the interest of all persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months.

Arizona.—Same. Rev. Stats., sec. 1165.

Idaho.—Same. Rev. Stats., sec. 5525.

Montana.—Same. Comp. Stats., p. 327, sec. 206.

Nevada.—Same. Rev. Stats., sec. 2843.

Oregon.—Hill's Laws, sec. 1150, under § 196, *ante*.

Utah.—Same. Comp. Laws, sec. 4178.

Washington.—Same, to the word, "he"; then as follows: "He may adjourn it for any time not exceeding fourteen days." Code Proc., sec. 1017.

Wyoming.—Same as California. Laws 1890-91, p. 281, sec. 31.

§ 203. [1558.] Notice of Postponement.—In case of a postponement, notice thereof must be given, by a public declaration, at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given, by posting notices in three or more public places in the county where the land is situated, or publishing the same, or both, as the time and circumstances will admit.

Arizona.—Same. Rev. Stats., sec. 1166.

Idaho.—Same. Rev. Stats., sec. 5526.

Montana.—Same. Comp. Stats., p. 327, sec. 207.

Nevada.—Same. Gen. Stats., sec. 2844.

Oregon.—Hill's Laws, sec. 1150, under § 196, *ante*.

Utah.—Same. Comp. Laws, sec. 4179.

Washington.—Same. Code Proc., sec. 1018.

Wyoming.—Same, to and including the words "given by," and then as follows: "Publishing the same in the same manner as the original notice was given." Laws 1890-91, p. 281, sec. 32.

California.—Section 1559 was repealed. Stats., 1873-74, p. 371.

§ 204. [1560.] Payment of Debts, etc., Provided for by Will.—If the testator makes provision by his will, or designates the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they must be paid, according to such provision or designation, out of the estate thus appropriated, so far as the same is sufficient.

Arizona.—Same. Rev. Stats., sec. 1167.

Idaho.—Same. Rev. Stats., sec. 5527.

Montana. — Same. Comp. Stats., p. 328, sec. 208.

Nevada. — Same. Gen. Stats., sec. 2846.

Utah. — Same. Comp. Laws, sec. 4180.

Washington. — Same. Code Proc., sec. 1026.

Wyoming. — Same. Laws 1890-91, p. 281, sec. 33.

§ 205. [1561.] **Sale without Order.** — When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case, no title passes unless the sale be confirmed by the court.

Arizona. — Same. Rev. Stats., sec. 1168.

“Whenever, in a will, power is given to an executor to sell any property of the testator, no order of the probate judge shall be necessary to authorize the executor to make such sale, and when any particular directions are given by a testator in his will respecting the sale of any property belonging to his estate, the same shall be followed, unless such directions have been annulled or suspended by order of the court, as in this act provided.” Rev. Stats., sec. 1267.

“If a testator in his will directs his personal estate or any part thereof not to be sold, the same shall be reserved from sale, unless such sale be necessary for the payment of debts.” Rev. Stats., sec. 1268.

Idaho. — Same as California. Rev. Stats., sec. 5528.

Montana. — Same as California. Comp. Stats., p. 328, sec. 209.

Nevada. — Same as California, except that notice of sale must be given, and the sale conducted as if under order of the court, unless the will contains special directions to the contrary, and the court may require security, as in other sales, to be given by executor before confirmation. Gen. Stats., sec. 2847.

Oregon. — All that part of the section beginning with the word “but” is the same, except last sentence, which is omitted. First part of section as follows: “When the testator shall make provision in his will for the sale or disposition of all or any particular portion of his estate for the payment of funeral charges, expenses of administration, or of claims against the estate, the property so appropriated may be sold or disposed of as directed, by the executor or administrator with the will annexed, without an order of the court therefor.” Hill’s Laws, sec. 1155.

Utah. — Same as California, except that “as the testator may have directed” is substituted for “as the executor may determine.” Comp. Laws, sec. 4181.

Washington. — Same as California. Code Proc., sec. 1040.

"When such provision has been made, or any property directed to be sold, the executor or administrator with the will annexed may proceed to sell without the order of the court; but he shall be bound as an administrator to give notice of the sale, and to proceed in making the sale in all respects as if he were under the order of the court, unless there are special directions given in the will, in which case he shall be governed by such directions; but in no [all] cases he shall make return of the sale to the court, which shall vacate such sale, unless the same shall appear in all respects and be made according to law in like manner as upon sales made by administrators." Code Proc., sec. 1027.

Wyoming. — Same as California. Laws 1890-91, p. 281, sec. 34.

Form of Order Confirming Sale: See § 199, *ante*. See § 182, *ante*, and notes.

The return of sale required is the same as that mentioned in § 197, *ante*.

The provisions of this section do not apply where decedent devises his property in trust, with power to sell, convey, and pay claims without any order of court, nor need a sale made by such executor be confirmed by the court before conveyance to the purchaser: *In re Williams*, 92 Cal. 183.

It is the duty of the court, in such case, on motion, to dismiss proceedings for confirmation. It is error to refuse to do so, and to proceed and confirm a sale to a higher bidder: *In re Williams*, 92 Cal. 183.

Stock in this state may be sold by a foreign executor, under a power contained in the will, without the issuance of letters of administration or giving the bond required in section 326 of the Civil Code: *Brown v. S. F. G. L. Co.*, 58 Cal. 426.

Where a will authorizes the executors to sell real property for the purpose of carrying the will into effect and paying debts, the deed of one of the executors is valid, and will convey title to the property. The sale need not be at auction, and if a part of the purchase-money is paid down, the heirs cannot rescind without returning the money: *Panand v. Jones*, 1 Cal. 488.

If a will gives the executor a naked power to sell the estate, without any special directions, and not coupled with an interest therein, the sale made by him must be reported to and confirmed by the court; and if not, made at public auction, the judge must make an order fixing a day for hearing the report, and the clerk must

give notice thereof, as required by section 1552 of the Code of Civil Procedure: *Perkins v. Gridley*, 50 Cal. 97; *In re Durham*, 49 Cal. 490.

Where the will of a husband makes his wife sole executrix and devisee, with authority to dispose of the estate at public or private sale, without the previous order of any court: Held, that she may sell without any previous order of any court. A statute declaring that "no sale of any property of an estate shall be valid unless made under order of the court" applies only to sales in cases not provided for by will. The statute is operative only in the absence of testamentary power: *Payne v. Payne*, 18 Cal. 291; *Cowell v. Buckelew*, 14 Cal. 641; *Larco v. Casaneuana*, 30 Cal. 560; *Norris v. Harris*, 15 Cal. 256; *Fallon v. Butler*, 21 Cal. 31; *In re Durham*, 49 Cal. 490.

If the will devises real estate to the executor in trust, and directs him to sell the same, and does not speak of dispensing with an order directing the sale or confirming it, the executor may make a valid sale without such orders: *In re De Laney*, 49 Cal. 76.

A sale and conveyance by executors, without an order of court, under a will devising property to them in trust, but not authorizing any sale of the realty, otherwise than by a direction to pay the debts of the testator, is void, and passes no title to the purchasers: *Huse v. Den*, 85 Cal. 390.

Administrator with will annexed can exercise all the powers under the will which were invested in the executor, unless there is a special limitation: *Kidwell v. Brummagim*, 32 Cal. 438.

When a will directs the executor to sell testator's real estate within one

year, and apply the proceeds to certain trusts, the power to sell is not limited to one year, but may be exercised after that time, unless there are express words in the will showing testator's intention to thus limit the exercise of the power: *Kidwell v. Brummagim*, 32 Cal. 436.

If the testator devises his real estate to his children, and appoints an executor in his will, to whom he gives full power to sell his real estate, the executor does not hold the title thereto in trust for the children: *Aguisola v. Arnaz*, 51 Cal. 435.

Beneficiaries entitled to residue of estate devised to executors, in trust, with power of sale may, at their option, have such residue distributed to them in kind, or have a sale and a division of the proceeds: *In re Delaney*, Myr. Prob. 9; affirmed 49 Cal. 76.

When the legal estate is vested in executors for the purpose of sale and conveyance, it is not absolutely necessary that they should qualify or report their proceedings in that regard to the probate court: *Hogan v. Wyman*, 2 Or. 302; *Brown v. Brown*, 7 Or. 285.

When a testator makes provisions in his will for the sale of land of which he died seised, the executors may sell the same by virtue of the power conferred by the will; but such sale must be reported to the county court and confirmed, as in other cases

of sales of real property by executors and administrators: *Northrop v. Marquam*, 16 Or. 173.

In case of a child or children not named or provided for, a sale by the executors under the will transfers to the purchaser all that the executors could lawfully sell; but the interest of such child or children not named or provided for being excepted out of the will by the statute, remains unaffected by such sales: *Northrop v. Marquam*, 16 Or. 173.

A will which directs the sale of the real estate of the testator by the executors does not work an equitable conversion of the interest of a child or children not named or provided for by the will: *Northrop v. Marquam*, 16 Or. 173.

Where a will does not provide for the children of the testator, or show that the omission to do so was intentional, but gives to the testator's wife all of his property, with absolute power to sell any or all of it without application to or approval or authority of any court, a sale of the property by the wife of the testator, without any previous order of the court therefor, which is not shown to have been necessary for the payment of debts of the decedent, or expenses of administration, although confirmed by the court, does not transfer to the purchaser the title to the land as against the testator's children: *Smith v. Olmstead*, 88 Cal. 582.

§ 206. [1562.] Where Provision by Will Insufficient.—If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this chapter.

Arizona.—Same. Rev. Stats., sec. 1169.

Idaho.—Same. Rev. Stats., sec. 5529.

Montana.—Same. Comp. Stats., p. 328, sec. 210.

Nevada.—Same. Gen. Stats., sec. 2848.

Utah.—Same. Comp. Laws, sec. 4182.

Washington.—Same. Code Proc., sec. 1028.

Wyoming.—Same. Laws 1890-91, p. 281, sec. 35.

§ 207. [1563.] Estate Subject to Debts, etc.—The estate, real and personal, given by will to legatees or devisees is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises or legacies, but specific devises or legacies are exempt from such liability, if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate.

Arizona.—Same. Rev. Stats., sec. 1170.

Idaho.—Same. Rev. Stats., sec. 5530.

Montana.—Same. Comp. Stats., p. 328, sec. 211.

Nevada.—Same. Gen. Stats., sec. 2849.

Oregon.—Same. Hill's Laws, sec. 1157.

Utah.—Same, with these words omitted: "It appears to the court necessary to carry into effect the intention of the testator, and." Comp. Laws, sec. 4183.

Washington.—Same as California. Code Proc., sec. 1029.

Wyoming.—Same as California. Laws 1890-91, p. 282, sec. 36.

§ 208. [1564.] Contribution among Legatees.—When an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the court, when distribution is made, must, by decree for that purpose, settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares, respectively, for the purpose of paying such contribution.

Arizona.—Same. Rev. Stats., sec. 1171.

Idaho.—Same. Rev. Stats., sec. 5531.

Montana.—Same. Comp. Stats., p. 328, sec. 212.

Nevada.—Same. Gen. Stats., sec. 2850.

Oregon.—"When any testator in his last will shall give any chattel or real estate to any person, and the same shall be taken in execution for the payment of the testator's debts, then all the other legatees, devisees, and heirs shall refund their proportional part of such loss to such person from whom the bequest shall be taken." Hill's Laws, sec. 3095.

Utah.—Same as California. Comp. Laws, sec. 4184.

Washington.—Same as California. Code Proc., sec. 1030.

Wyoming.—Same as California. Laws 1890-91, p. 282, sec. 37.

§ 209. [1565.] Contract for Purchase of Lands may be Sold. — If a decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such land and under such contracts may be sold on the application of his executor or administrator, in the same manner as if he had died seised of such land, and the same proceedings may be had for that purpose as are prescribed in this chapter for the sale of lands of which he died seised, except as hereinafter provided.

Arizona. — Same. Rev. Stats., sec. 1172.

Idaho. — Same. Rev. Stats., sec. 5532.

Montana. — Same. Comp. Stats., p. 328, sec. 213.

Nevada. — Same. Gen. Stats., sec. 2851.

Oregon. — Same. Hill's Laws, sec. 1158.

Utah. — Same. Comp. Laws, sec. 4185.

Washington. — Same. Code Proc., sec. 1031.

Wyoming. — Same. Laws 1890-91, p. 282, sec. 38.

NOTE. — All forms under this section are the same as those under sales of real property: See §§ 183 et seq., *ante*.

§ 210. [1566.] Conditions of Sale. — The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the court until the purchasers execute a bond to the executor or administrator for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the court or judge shall approve.

Arizona. — Same. Rev. Stats., sec. 1173.

Idaho. — Same. Rev. Stats., sec. 5533.

Montana. — Same. Comp. Stats., p. 329, sec. 214.

Nevada. — Same. Gen. Stats., sec. 2852.

Oregon. — Same. Hill's Laws, sec. 1159.

Utah. — Same. Comp. Laws, sec. 4186.

Washington. — Same. Code Proc., sec. 1032.

Wyoming. — Same. Laws 1890-91, p. 282, sec. 39.

§ 211. [1567.] Purchaser to Give Bond. — The bond must be conditioned that the purchaser will make all payments for such land that become due after the date of the sale, and will fully indemnify the executor or administrator and the

persons so entitled against all demands, costs, charges, and expenses, by reason of any covenant or agreement contained in such contract.

Arizona. — Same. Rev. Stats., sec. 1174.

Idaho. — Same. Rev. Stats., sec. 5534.

Montana. — Same. Comp. Stats., p. 329, sec. 215.

Nevada. — Same, with the following added: "But if there be no payments thereafter to become due on such contract, no bond shall be required by the purchaser." Gen. Stats., sec. 2853.

Oregon. — Same as California. Hill's Laws, sec. 1159.

Utah. — Same as California. Comp. Laws, sec. 4187.

Washington. — Same as California. Code Proc., sec. 1033.

Wyoming. — Same as California. Laws 1890-91, p. 282, sec. 40.

Form No. 157.—Bond to be Given on Sale of Contract for Purchase of Lands.

Know all men by these presents, that we, — as principal, and — and — as sureties, are held and firmly bound unto —, for himself, and in trust for the estate of —, deceased, and of the persons interested in said estate, to be paid to said —, or his successors, heirs, or assigns, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this — day of —, A. D. 18—.

The condition of the above obligation is such, that whereas —, now deceased, did, on the — day of —, A. D. 18—, enter into a contract in writing with — to purchase the following described real property, to wit (description); and whereas said contract of purchase has not been fully completed, and whereas said —, as — of the estate of said —, deceased, has sold said contract of purchase and the interest of said decedent therein, and said — has purchased the same, and has agreed to perform all of the covenants in said contract agreed to be performed by said —, now deceased, and make all payment now due or which shall become due thereon; and whereas said sale was made in pursuance of an order of the — court of the county of —, state of —;

Now, therefore, if all the conditions of the said contract of

purchase of said real property, which by the terms of said contract of purchase were to be performed by said —, deceased, shall be fully performed by said —, and if said — shall well and truly pay all sums which are due, or which may become due, on said contract, and save said —, the — of said estate, and said estate, and all persons interested therein, harmless by reason of and from said contract of purchase, then this obligation shall be void, otherwise to remain in full force and virtue.

— [SEAL]

— [SEAL]

— [SEAL]

(Justification as in Form No. 53, § 70, *ante*.)

§ 212. [1568.] Executor to Assign Contract.—

Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs and assigns, all the right, title, and interest of the estate, or of the persons entitled to the interest of the decedent in the lands sold at the time of the sale, and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have had if he were living.

Arizona. — Same. Rev. Stats., sec. 1175.

Idaho. — Same. Rev. Stats., sec. 5535.

Montana. — Same. Comp. Stats., p. 329, sec. 216.

Nevada. — Same. Gen. Stats., sec. 2854.

Oregon. — Same. Hill's Laws, sec. 1160.

Utah. — Same. Comp. Laws, sec. 4188.

Washington. — Same. Code Proc., sec. 1034.

Wyoming. — Same. Laws 1890-91, p. 282, sec. 41.

NOTE. — The assignment mentioned in the above section should be the same as deed under sales of real estate, § 200, *ante*.

§ 213. [1569.] Sales of Lands under Mortgages or Liens. — When any sale is made by an executor or administrator, pursuant to provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase-money must be applied, after paying the necessary expenses of the sale, first, to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course

of administration. The application of the purchase-money to the satisfaction of the mortgage or lien must be made without delay; and the land is subject to such mortgage or lien until the purchase-money has been actually so applied. No claim against any estate, which has been presented and allowed, is affected by the statute of limitations, pending the proceedings for the settlement of the estate. The purchase-money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the court, to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease, and the purchase-money must be paid over by the clerk of the court without delay, in payment of the expenses of the sale, and in satisfaction of the debt to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court otherwise directs.

Arizona. — Rev. Stats., sec. 1176.

Idaho. — Same. Rev. Stats., sec. 5536.

Montana. — Same. Comp. Stats., p. 329, sec. 217.

Nevada. — Same, except last sentence is omitted; and the following is added: "*Provided, however,* that when it shall be shown to be necessary, the court may direct that sufficient of such purchase-money be retained to meet such portions of the family allowance and charges and expenses of administration as may properly be required from the holder of such claims; such reservation of a portion of the purchase-money shall not prevent the discharge of the mortgage or lien, and no lien against any estate shall be affected by the statute of limitations pending the proceedings for the settlement of such estate." Gen. Stats., sec. 2855.

"In all cases in which land is sold by an executor or administrator, the necessary expenses of the sale shall first be paid out of the proceeds." Gen. Stats., sec. 2856.

Oregon. — "If the deceased left any property, real or personal, under mortgage, and did not devise or provide for the redemption of the same by will, the court, or judge thereof, upon the application of the executor or administrator, or the application of an heir or creditor, or other person interested in the estate, may order the executor or administrator to redeem such property out of the proceeds of the other personal property, if it appear that such redemption would be for the interest of the estate, and not prejudicial to creditors." Hill's Laws, sec. 1161.

"If, upon such application, such redemption be deemed not proper, or inexpedient, the court shall order such property to be sold, in like manner and

with like effect as is provided in other cases of the sale of real property by this title; and the conveyance to the purchaser shall operate to convey to him all the estate, right, and interest which the deceased would have had in the property had not the same been mortgaged by him." Hill's Laws, sec. 1162.

"Ten days before making an order for the application of the proceeds of such sale, the mortgagee, or other person to whom the debt which is secured by such mortgage is payable, shall be cited to appear and show the amount of his debt, and make his objections, if any, to the report of the expenses of the proceeding and sale as claimed by the executor or administrator, and thereupon the court shall order that the proceeds of the sale be first applied to the payment of the proper expenses of the proceeding and sale, and secondly, to the satisfaction of such debt, and the residue, if any, in due course of administration." Hill's Laws, sec. 1163.

"Sections 1161, 1162, and 1163 shall not be construed to include a mortgage which has been foreclosed, or upon which a suit has been commenced for foreclosure, before the application for the order of redemption or sale is made, nor to any other lien arising upon judgment or decree given against the deceased in his lifetime." Hill's Laws, sec. 1164.

"If the debt secured by the mortgage mentioned in section 1161 be not due at the time of the making of the order for redemption or application of the proceeds of the sale, the party to whom it is payable shall be entitled to receive in satisfaction thereof such sum as may be ascertained to be equal to the present value thereof." Hill's Laws, sec. 1165.

Utah. — Same as California. Comp. Laws, sec. 4189.

Washington. — "If any person die, having mortgaged any real or personal estate, and shall not have devised the same, or provided for the redemption thereof by will, the court, upon the application of any person interested, may order the executor or administrator to redeem the estate out of the personal assets, if it should appear to the satisfaction of the court that such redemption would be beneficial to the estate, and not injurious to creditors." Code Proc., sec. 1035.

"If it shall be made to appear to the satisfaction of the court that it will be to the interest of the estate of any deceased person to sell other real or personal estate of the decedent than that mortgaged by him, to redeem the real estate so mortgaged, the court may order any real or personal estate of the decedent which it may deem expedient to be sold for such purpose, which sale shall be conducted in all respects as other sales of like property ordered by the court." Code Proc., sec. 1036.

"If such redemption be not deemed expedient, the court shall order such property to be sold at public sale, which sale shall be with the same notice and conducted in the same manner as required in other cases of real estate provided for in this act, and the executor or administrator shall thereupon execute a conveyance thereof to the purchaser, which conveyance shall be effectual to convey to the purchaser all the right, title, and interest which the deceased would have had in the property had not the same been mortgaged by him, and the purchase-money, after paying the expenses of the sale, shall first be applied to the payment and discharge of such mortgage, and the residue in

due course of administration. If said sale of the mortgaged premises shall be insufficient to secure the mortgage debt, the mortgagee shall file a claim for balance, authenticated as other claims, and payable in due course of administration." Code Proc., sec. 1037.

Wyoming. — Same as California. (The clause "must be paid over by the clerk" reads "to the clerk"; but this is apparently a clerical error. — Ed.) Laws 1890-91, p. 283, sec. 42.

The provisions of this section are not controlled by the general provisions of the statute relating to the payment of debts: *In re Murray*, 18 Cal. 687.

The statute of limitations does not run against a note, the estate of the maker of which was not closed when the suit was brought, and the claim on which note had then been

allowed: *Wise v. Williams*, 72 Cal. 544; *In re Schroeder*, 46 Cal. 317; *Dohs v. Dohs*, 60 Cal. 255; *Savings & Loan Soc. v. Hutchinson*, 68 Cal. 53.

Mortgage liens must be paid first out of proceeds of mortgaged property: *In re Murray*, 18 Cal. 687.

A court of probate cannot foreclose a mortgage: *Meyers v. Farquharson*, 46 Cal. 200.

§ 214. [1570.] Holder of Lien may Purchase — His Receipt a Valid Payment. — At any sale, under order of the court, of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment *pro tanto*. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the court or the clerk thereof an amount sufficient to pay such expenses.

Arizona. — Same. Rev. Stats., sec. 1177.

Idaho. — Same. Rev. Stats., sec. 5537.

Montana. — Same. Comp. Stats., p. 330, sec. 218.

Utah. — Same. Comp. Laws, sec. 4190.

Wyoming. — Same. Laws 1890-91, p. 283, sec. 43.

Where a mortgage creditor purchased the mortgaged premises, and credited the mortgage debt with the amount of his bid, less ten per cent thereof paid to the administrator on the day of sale, it was held to be a payment in full of the purchase price: *In re Lewis*, 39 Cal. 306.

§ 215. [1571.] Liability for Misconduct in Sale. — If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise.

Arizona. — Same. Rev. Stats., sec. 1178.

Idaho. — Same. Rev. Stats., sec. 5538.

Montana. — Same. Comp. Stats., sec. 330, p. 219.

Nevada. — Same. Gen. Stats., sec. 2857.

Utah. — Same. Comp. Laws, sec. 4191.

Washington. — Same. Code Proc., sec. 1038.

Wyoming. — Same. Laws 1890-91, p. 283, sec. 44.

In an action to recover on the bond of an executor or administrator, under the above section, for his misconduct in proceedings relating to a sale of the real estate of deceased, the complaint must show that the sale actually damaged plaintiff; where it contains no averments with respect to any proceedings in the probate court subsequent to the confirmation of the sale, and affirmatively shows that the land was sold for its full value, no damage is alleged, and plaintiff will be left to his remedy in the probate court: *Weihe v. Statham*, 67 Cal. 245.

§ 216. [1572.] **Fraudulent Sales.** — Any executor or administrator who fraudulently sells any real estate of a decedent, contrary to or otherwise than under the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein.

Arizona. — Same. Rev. Stats., sec. 1179.

Idaho. — Same. Rev. Stats., sec. 5539.

Montana. — Same. Comp. Stats., p. 330, sec. 220.

Nevada. — Same. Gen. Stats., sec. 2858.

Utah. — Same. Comp. Laws, sec. 4192.

Washington. — Same. Code Proc., sec. 1039.

Wyoming. — Same. Laws 1890-91, p. 283, sec. 45.

Richardson v. Sage, 57 Cal. 212.

An executor or administrator who fraudulently sells the decedent's realty is liable in damages in double the value of the land sold; such damages being recoverable in an action by the person having an estate of inheritance therein, but they are not recoverable from the sureties on the bond of such executor or administrator: *Weihe v. Statham*, 67 Cal. 245.

§ 217. [1573.] **Limitations of Actions for Vacating Sale, etc.** — No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds upon which the action is based.

Arizona. — "The sale" substituted for "the settlement of the final account of the executor or administrator"; otherwise same. Rev. Stats., sec. 1180.

Idaho. — Same as Arizona. Rev. Stats., sec. 5540.

Montana. — Same as Arizona. Comp. Stats., p. 330, sec. 221.

Nevada. — Same as Arizona, except that last sentence is omitted. Gen. Stats., sec. 2859.

Utah. — Same as Arizona. Comp. Laws, sec. 4193.

Wyoming. — Same as California. Laws 1890-91, p. 284, sec. 46.

Setting aside Fraudulent Sales: Cal. Code Civ. Proc., sec. 338.

Distribution: See § 289, *post*, and notes.

Limitation of actions for the recovery of real property sold by an executor or administrator does not bar minor heirs, if the person who assumes to act as administrator had not taken out letters of administration, and had not given an official bond as public administrator, and had not taken the oath of office as such: *Staples v. Connor*, 79 Cal. 14.

The requirement of the probate law that "no action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale," is applicable to all sales made by probate courts of real estate belonging to persons who

have died since the passage of the probate act, whether such sales be void or voidable; and the rule applies, though the invalidity of the sale resulted from an insufficiency in the notice for appointment of the administrator: *Ganahl v. Sager*, 68 Cal. 95; *Harlan v. Peck*, 33 Cal. 515.

The above section does not apply to a sale, under an order of court, of land which had devolved upon the heirs by virtue of their ancestor's death, prior to any legislation in this state regulating the administration of decedent's estates: *McNeil v. First Cong. Society*, 66 Cal. 105.

A sale made under order of a probate court by an administrator, even though such sale is void, will be sustained, unless an action is brought within the next three years after it is made to recover the lands sold from the possession of the purchaser: *Meeks v. Vassault*, 3 Saw. 206.

§ 218. [1574.] To What Cases Preceding Section not to Apply. — The preceding section shall not apply to minors or others under any legal disability, to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability.

Arizona. — Same. Rev. Stats., sec. 1181.

Idaho. — Same. Rev. Stats., sec. 5541.

Montana. — Same. Comp. Stats., p. 330, sec. 222.

Nevada. — Same. Gen. Stats., 2860.

Utah. — Same, except that the limitation is one year. Comp. Laws, sec. 4194.

Wyoming. — Same as California. Laws 1890-91, p. 284, sec. 47.

§ 219. [1575.] Account of Sale to be Returned. — When a sale has been made by an executor or administrator, of any property of the estate, real or personal, he must return to the court, within thirty days thereafter, an account of

sales, verified by his affidavit. If he neglects to make such return, he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue, or such revocation should not be made.

Arizona. — The return must be made at the next term of court after the sale; otherwise same. Rev. Stats., sec. 1182.

Idaho. — Same as Arizona. Rev. Stats., sec. 5542.

Montana. — Same as Arizona. Comp. Stats., p. 331, sec. 223.

Nevada. — Same as Arizona. Gen. Stats., sec. 2861.

Utah. — Same. Comp. Laws, sec. 4195.

Wyoming. — Same as California. Laws 1890-91, p. 284, sec. 48.

Return of Sales: See §§ 176, 197, *ante*.

§ 220. [1576.] Who cannot Purchase. — No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale.

Arizona. — Same. Rev. Stats., sec. 1183.

Idaho. — Same. Rev. Stats., sec. 5543.

Montana. — Same. Comp. Stats. 331, sec. 224.

Nevada. — Same, except that the clause "nor must he be interested in any sale" is omitted. Gen. Stats., sec. 2862.

Oregon. Same as Nevada. Hill's Laws, sec. 1166.

Utah. — Same as California. Comp. Laws, sec. 4191.

Wyoming. — Same as California. Laws 1890-91, p. 284, sec. 49.

An executor named in the will and appointed by the court does not become a trustee of the estate until he qualifies; and contracts made by him with the executrix, if fair and just, are not void although he is benefited thereby: *Bowden v. Pierce*, 73 Cal. 459.

A contract by an executrix with third persons, who have full knowledge of the facts, that they shall buy the personal property of the estate at a probate sale thereof for her account and risk, and advance the purchase price, and that she will pay them a percentage on the amount of the purchase, and also on the amount of resales by them, is unlawful and void, without regard to any beneficial result to the estate: *Jones v. Hanna*, 81 Cal. 507.

An executor purchasing property sold under order of court, from the bidder at the sale, prior to the con-

firmation and report, will be decreed a trustee at the instance of the heirs, and compelled to account to them, although no understanding was had between the executor and the purchaser prior to the sale, and although the property brought a fair price: *O'Connor v. Flynn*, 57 Cal. 293.

If an administrator at his own sale, made under an order of court, buys the land of the estate through another person, the sale is not void, but only voidable, at the election of the heirs, or other persons interested in the estate. They may have the sale set aside and the administrator declared a trustee: *Boyd v. Blankman*, 29 Cal. 19; *Scott v. Umbarger*, 41 Cal. 410; *Bernal v. Lynch*, 36 Cal. 146, where the following cases are cited to this point: *Kelsey v. Abbott*, 13 Cal. 609; *Moss v. Shear*, 25 Cal. 38; *McMinn v. Whelan*, 27 Cal. 318; *Coppinger v. Rice*, 33 Cal. 408. See § 251, *post*.

Where an executor buys land from a devisee, and a deed thereof is made to his wife, and afterwards the executors make a deed of the same property to her, under a power of sale in the will, and thereafter the property is distributed to her under a decree of the probate court, it being admitted that she acted for the executor, the executor cannot plead such order of distribution by way of estoppel to an action brought against him by the devisees to set aside the sale, the question of setting aside the deed not having been presented and considered upon the application for distribution: *Golson v. Dunlap*, 73 Cal. 157.

The fact that one who was named in a will as executor applied for letters, which the court granted, does not make him a trustee of the estate, when he refused or neglected to qualify; and contracts

made by him with the executrix, if fair and just, are not void, although they redounded to his benefit: *Bowden v. Pierce*, 73 Cal. 459.

There is nothing in the probate law to prohibit an executor from becoming interested in property of the estate of his testator after the estate has ceased to have any interest in it: *In re Millenovich*, 5 Nev. 161.

The provision prohibiting executors or administrators from purchasing claims against an estate is for the protection of the estate: *Furth v. Wyatt*, 17 Nev. 180.

Executors are prohibited by statute from being interested in the purchase of the estate, yet if such a purchase be made, the court may affirm it, the only consideration in such case being the promotion of the interest of the estate: *In re Millenovich*, 5 Nev. 161.

ARTICLE V.

MORTGAGES AND LEASES.

§ 221. Mortgage or lease of real property.

§ 222. Manner of obtaining authority.

§ 223. Obtaining order to lease.

§ 221. [1577.] Mortgage or Lease of Real Property.—Whenever, in any estate now being administered or that may hereafter be administered, it shall appear to the superior court, or a judge thereof, to be for the advantage of the estate to raise money by a mortgage of the real property of any decedent, or of a minor, or an incompetent person, or any part thereof, or to make a lease of said realty, or any part thereof, the court or judge, as often as occasion therefor shall arise in the administration of any estate, may, on a petition, notice, and hearing, as provided in this article, authorize, empower, and direct the executor or administrator, or guardian of such minor or incompetent person, to mortgage or lease such real estate, or any part thereof. (Amendment approved March 31, 1891. Cal. Stats. 1891, p. 247.)

Montana.—“In all cases the executor or administrator of an estate, instead of selling the property of the estate to pay the charges and demands against the same, may borrow money at the lowest rate of interest at which

it may be had, and for such length of time the court may allow, to pay such claims, when it shall be made to appear to the court, by petition and evidence, that an immediate sale of the property of the estate will be detrimental to the heirs, devisees, legatees, or other persons having an interest therein; and in such case the estate shall be chargeable with the payment of such sum so borrowed, and interest thereon. Such petition may be made by the executor or administrator, or by any one of the heirs of the deceased, or other person interested in the estate. Notice shall be given as follows: If by the executor or administrator, to all the heirs, devisees, legatees, residing in the territory; and if by any heir, devisee, or legatee, to the administrator or executor, and to all other heirs, devisees, and legatees residing in the territory, — which notice shall be given as notice to creditors by an executor or administrator is required by the provisions of this act." Comp. Stats., p. 318, sec. 172.

Oregon. — See § 549, *post*.

Interest on money borrowed by an executor or administrator should not be allowed, because he has no authority to borrow money for the use of the estate: *In re Millenovich*; 5 Nev. 161.

§ 222. [1578.] Manner of Obtaining Authority. — To obtain an order to mortgage such realty, the proceedings to be taken and the effect thereof shall be as follows: —

1. The executor, administrator, guardian of any minor, or incompetent person, or any person interested in the estates of such decedents, minors, or incompetent persons, may file a verified petition, showing, — 1. The particular purpose or purposes for which it is proposed to make the mortgage, which shall be either to pay the debts, legacies, or charges of administration, or to pay, reduce, extend, or renew some lien or mortgage already subsisting in [on] said realty, or some part thereof; 2. A statement of the debts, legacies, charges of administration, liens, or mortgages to be paid, reduced, extended, or renewed, as the case may be; 3. The advantage that may accrue to the estate from raising the required money by mortgage, or providing for the payment, reduction, extension, or renewal of the subsisting liens or mortgages, as the case may be; 4. The amount to be raised, with a general description of the property proposed to be mortgaged; and 5. The names of the legatees and devisees, if any, and of the heirs of the deceased, or of the minor, or of the incompetent person, as the case may be, so far as known to the petitioner.

2. Upon filing such petition, an order shall be made by the court or judge, requiring all persons interested in the estate to

appear before the court or judge, at a time and place specified, not less than four nor more than ten weeks thereafter, then and there to show cause why the realty (briefly indicating it), or some part thereof, should not be mortgaged (for) the amount mentioned in the petition, stating such amount, or such lesser amount as to the court or judge shall seem meet, and referring to the petition on file for further particulars.

3. The order to show cause may be personally served on the persons interested in the estate, at least ten days before the time appointed for hearing the petition, or it may be published for four successive weeks in a newspaper of general circulation published in the county.

4. At the time and at the place appointed in the order to show cause, or at such other time and place to which the hearing may be postponed (the power to make all needful postponements being hereby vested in the court or judge), having first received satisfactory proof of personal service, or publication of the order to show cause, the court or judge must proceed to hear the petition, and any objections that may be filed or presented thereto. Upon such hearing, witnesses may be compelled to attend and testify, in the same manner and with like effect as in other cases; and if after a full hearing the court or judge is satisfied that it will be for the advantage of the estate to mortgage the whole or any portion of the real estate, an order must be made authorizing, empowering, and directing the executor or administrator, or the guardian of such minor or incompetent person, to make such mortgage. The order may direct that a lesser amount than that named in the petition be borrowed, and may prescribe the maximum rate of interest and period of the loan, and require that the interest, and the whole or any part of the principal, be paid, from time to time, out of the whole estate, or any part thereof, and that any buildings on the premises to be mortgaged shall be insured for further security of the lender, and the premiums paid from such income.

5. After the making of the order to mortgage, the executor, administrator, or guardian of a minor or of an incompetent person, shall execute, acknowledge, and deliver a mortgage of the premises for the amount and period specified in the order, set-

ting forth in the mortgage that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county recorder of every county in which the encumbered land or any portion thereof lies. No bond, note, or other personal obligation shall be given with the mortgage or created thereby.

6. Every mortgage so made shall be effectual to mortgage and hypothecate all the right, title, interest, and estate which the decedent, minor, or incompetent person had in the premises described therein at the time of the death of such decedent, or at the time of the appointment of the guardian of such minor or of such incompetent person, or prior thereto, and any right, title, or interest in said premises acquired by the estate of such decedent, minor, or incompetent person, by operation of law or otherwise, since the time of the death of such decedent, or the appointment of the guardian of such minor or incompetent person. Jurisdiction of the court to administer the estate of such decedent, minor, or incompetent person shall be effectual to vest such court and judge with jurisdiction to make the order for the mortgage, and such jurisdiction shall conclusively inure to the benefit of the mortgagee named in the mortgage, his heirs and assigns. No irregularity in the proceedings shall impair or invalidate the same, or the mortgage given in the pursuance thereof; and the mortgagee, his heirs and assigns, shall have and possess the same rights and remedies on the mortgage as if it had been made by the decedent prior to his death, the minor after reaching the age of maturity, or the incompetent person when legally competent; *provided, however*, that upon any foreclosure, if the proceeds of the encumbered property are insufficient to pay the mortgage, no judgment or claim for any deficiency of such proceeds, to satisfy the mortgage, or the costs or expenses of sale, shall be had or allowed, except in cases where the mortgage was given to pay, reduce, extend, or renew a lien or mortgage subsisting on the realty, or some part thereof, at the time of the death of the decedent, and the indebtedness secured by such lien or mortgage was an allowed and approved claim against his estate, or when the interest of the minor vested in him, or at the time the incompetency of the incompetent person was so declared by

the court; *and provided also*, that in cases affecting the estate of the deceased persons, the part of the indebtedness remaining unsatisfied must be classed and paid with other demands against the estate, as provided in article III., chapter X., of title XI., part III., of this code, with respect to mortgages subsisting at the time of death. [Amendment approved March 31, 1891. Cal. Stats. 1891, p. 247.]

See §§ 272-282, *post*.

Form No. 158.—Petition for Leave to Mortgage Realty.

[Caption, Form No. 1, § 5, *ante*.]

1. That he is executor (administrator) of the estate of —, deceased, which is now in course of administration in this court;

2. That the names of the legatees and devisees of said decedent are as follows, to wit (here insert names), and that the names of the heirs of said deceased, so far as known to petitioner, are as follows, to wit (here insert names);

3. That said estate of said decedent is seised in fee of that certain real property situate, lying, and being in the — county of —, state of —, known and described as follows, to wit (here insert description of property);

4. That the value of said realty is about \$—, and the annual rents, issues, and profits thereof amount to about the sum of \$—;

5. That the following claims have been duly presented and allowed, and are on file herein, and are ranked among the acknowledged debts of said estate, viz. (here insert claims);

That the following legacies are due from said estate, viz., to —, the sum of \$—, etc.;

That the charges and expenses of administration amount to \$—;

That there is a subsisting mortgage upon said property, made, executed, and delivered by said decedent in his lifetime to —, to secure the payment of a certain promissory note described in said mortgage, for the sum of \$—, together with interest thereon, at the rate of — per cent per annum, from the — day of —, A. D. 18—, until paid; that there is now due, owing, and unpaid on said mortgage the sum of \$—, making

a total indebtedness of said estate, which it is necessary should be paid, of \$—;

6. That it is to the best interest of said estate that said property should not be sold, but that the same should be mortgaged for the purpose of raising funds with which to pay said debts, legacies, charges of administration, mortgage, etc., for the following reasons, to wit:—

a. That said real property is producing a high rate of interest on its value; that a portion thereof could not be sold without great injury to the residue thereof; that the amount to be raised to pay the indebtedness, etc., of said estate amounts to less than one fifth of the value of said realty, and the income of said property will be sufficient to pay off said mortgage rapidly;

b. (State any other advantage that may accrue to the estate from raising the required money by mortgage);—

Wherefore petitioner prays that an order be entered herein authorizing, empowering, and directing the executor (administrator) of said estate to mortgage said property for the purpose of raising a sum sufficient to pay said debts, etc.

Dated —, 18—.

—, Petitioner.

(Verification, Form No. 55, § 80, *ante*.)

Form No. 159. — Order to Show Cause why Realty should not be Mortgaged (Leased).

[Title of Court and Estate.]

Upon reading and filing the petition of —, praying that the executor (administrator) of the estate of —, deceased, be authorized, empowered, and directed to mortgage (lease) the real estate belonging to said estate, which is described as follows, to wit (here insert description of property);

It is ordered that all persons interested in said estate appear before the above-entitled court on the — day of —, A. D. 18—, at the hour of — o'clock, — M., at the court-room of said court, to show cause, if any they can, why the said real estate should not be mortgaged (leased) for the purpose of securing the sum of \$— (for the annual rental of \$—), as is more fully set forth in said petition, reference to which is hereby made for further particulars.

Dated —, 18—.

—, Judge of the — Court.

Form No. 160.—Order to Mortgage.

[Title of Court and Estate.]

Now, on this — day of —, A. D. 18—, the petition of —, praying for an order authorizing, empowering, and directing the executor (administrator or guardian, as the case may be) to mortgage the real property hereinafter described, coming on regularly to be heard, and it appearing that the order to show cause heretofore made and entered herein has been personally served upon all persons interested in said estate at least ten days prior to the time appointed for hearing said petition (or has been published for four successive weeks in the —, a newspaper of general circulation published in this county), and it appearing that no objections have been filed or presented to said petition, and it having been proven to the satisfaction of the court that it will be for the advantage of said estate to mortgage the real property hereinafter described, —

It is therefore ordered that the executor (administrator, etc.) of said estate be and he is hereby authorized, empowered, and directed to mortgage, for the purpose of securing the payment of \$—, with interest thereon, at not exceeding the rate of — per cent per annum, for the term of — years, the following described real property, which is situate in the county of —, state of —, and is known and described as follows, to wit (description). —, Judge of the — Court.

Dated —, 18—.

Form No. 161.—Mortgage of Realty of Estate.

This indenture, made the — day of —, A. D. 18—, between —, the duly appointed, qualified, and acting — of the estate of —, deceased, the party of the first part, and —, of the county of —, state of —, the party of the second part, witnesseth:—

That whereas, on the — day of —, A. D. 18—, the — court of the — county of —, state of —, made and entered an order authorizing, empowering, and directing the said party of the first part to mortgage certain real estate of the said —, deceased, situated in the — county of —, state of —, and specified and particularly described in said order,

which said order is now on file and of record in said court, and is hereby referred to, and made a part of this indenture;

And whereas, under and by virtue of said order, said party of the first part has agreed to mortgage the real estate hereinafter described, to said party of the second part, to secure the sum of — dollars, which said party of the second part has agreed to loan to the said party of the first part, for the use and benefit of said estate, for the period of — years, —

Now, therefore, in consideration of the premises and said loan of said sum for said period, the said party of the first part, mortgagor, mortgages to the said party of the second part, mortgagee, all that real property situate in the — county of —, state of —, which is known, designated, and described as (description), as security for the payment, on the — day of —, A. D. 18—, to said mortgagee of the said sum of — dollars, in gold coin of the present standard of value, with interest thereon from date until paid, at the rate of — per cent per —, in like coin, payable —, and if not paid, the interest may be added to the principal, and bear like interest, and the principal sum mentioned herein may, at the option of the holder hereof, without notice to the maker hereof, be treated as due and collectible, both principal and interest to be paid at —; and it is hereby further agreed that the mortgagor shall keep the improvements upon said premises insured for —, and will have the policies of such insurance made payable to the mortgagee as additional security for the satisfaction hereof, and in default of keeping said improvements insured as aforesaid, then said mortgagee may cause the same to be insured in his own name at the expense of said estate, and the mortgagor will, on demand, repay to the mortgagee, in gold coin, out of the funds of said estate, all moneys paid by the mortgagee to obtain said insurance, and this mortgage shall stand as security for such repayment to the mortgagee of all sums which he shall have paid for the purposes aforesaid, together with interest thereon, from the date of the payment thereof, at the rate of — per cent per —, until such repayment is made; and in case it shall become necessary to protect the title to said property, or the right to the possession thereof, or the lien of this mortgage, in any action or legal proceeding whatsoever, said mortgagee or

his assigns may take charge or control of such action or proceeding, and protect said possession, title, or lien, and this mortgage shall stand as security for the repayment of all moneys expended in such action or proceeding, for counsel fees or otherwise, together with interest thereon at the rate of — per cent per —.

And in case default be made in the payment of the whole of said principal sum, or of any installment thereof, or of any interest due thereon, then the mortgagee may, at his option, and without notice to the mortgagor, at once proceed to foreclose this mortgage; and on the filing of the complaint in such foreclosure proceeding, or at any time thereafter, the court shall, if requested by the plaintiff, name some disinterested person as receiver, and shall authorize such receiver to at once take possession of the mortgaged premises, and collect the rents and profits thereof, and apply them to the satisfaction of the judgment which may be given in said action, and to sell said premises in the same manner as lands are sold upon execution, and to continue in the use and possession of said premises, and to collect the rents and profits thereof, until the premises are redeemed from such sale, or until title is vested in the purchaser, by the execution of a conveyance in pursuance of the sale.

In witness whereof, the said mortgagor has hereto set his hand and seal the day and year first herein written.

[SEAL] —, Administrator (Executor) of the Estate of
—, Deceased.

§ 223. [1579.] Order to Lease. — To obtain an order to lease the realty, the proceedings to be taken and the effect thereof shall be as follows: —

1. The executor, administrator, guardian of a minor or of an incompetent person, or any person interested in the estates of such decedents, minors, or incompetent persons, may file a verified petition, showing, — 1. The advantage or advantages that may accrue to the estate from giving a lease; 2. A general description of the property proposed to be leased; 3. The term, rental, and general conditions of the proposed lease; and 4. The names of the legatees and devisees, if any, and of the heirs of

the deceased, or of the minor, or of the incompetent person, so far as known to the petition[er].

2. Upon filing such petition, an order shall be made by the court or judge requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than two nor more than four weeks thereafter, then and there to show cause why the realty (briefly indicating it) should not be leased for the period (stating it), at the rental mentioned in the petition (stating it), and referring to the petition on file for further particulars.

3. The order to show cause may be personally served on the persons interested in the estate at least ten days before the time appointed for hearing the petition, or it may be published for two successive weeks in a newspaper of general circulation in the county.

4. At the time and place appointed to show cause, or at such other time and place to which the hearing may be postponed (the power to make all needful postponements being hereby vested in the court or judge), the court or judge having first received satisfactory proof of personal service or publication of the order to show cause must proceed to hear the petition, and any objections that may have been filed or presented thereto. Upon such hearing, witnesses may be compelled to attend and testify, in the same manner and with like effect as in other cases, and the court may, in its discretion, appoint one or more, not exceeding three, disinterested persons to appraise the rental value of the premises, and direct that a reasonable compensation for the services, not to exceed five dollars per day, be paid by the estate. If, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to lease the whole or any portion of the real estate, an order must be made authorizing, empowering, and directing the executor, administrator, or the guardian to make such lease. The order may prescribe the minimum rental to be received for the premises, and the period of the lease, which must in no case be longer than for five years, and may prescribe the other terms and conditions of such lease.

5. After the making of the order to lease, the executor, administrator, or guardian of a minor, or of an incompetent per-

son, shall execute, acknowledge, and deliver a lease of the premises, for the term and period and with the conditions specified in the order, setting forth in the lease that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county recorder of every county in which the leased land or any portion thereof lies.

6. Every lease so made shall be effectual to demise and let, at the rent, for the term, and upon the conditions therein prescribed, the premises described therein. Jurisdiction of the court to administer the estate of the decedent, the minor, or of the incompetent person, shall be effectual to vest such court and judge with jurisdiction to make the order for the lease, and such jurisdiction shall conclusively inure to the benefit of the lessee, his heirs and assigns. No omission, error, or irregularity in the proceedings shall impair or invalidate the same, or the lease made in pursuance thereof. [Amendment approved March 31, 1891. Cal. Stats. 1891, p. 249.]

The administrator of a decedent's estate may, during the period of administration, lease the real property belonging to the estate, but any lease for a definite term is subject to be terminated by the final distribution of the estate and the discharge of the administrator: *Doolan v. McCauley*, 66 Cal. 476. See § 221, *ante*.

Form No. 162.—Petition for Leave to Lease Realty.

[Caption, Form No. 1, § 5, *ante*.]

(Follow subdivisions 1, 2, and 3 of Form No. 158.)

4. That said realty is at present unproductive, but the same can be leased for an annual rental of \$—, and it is proposed to lease said premises under the terms and conditions of a lease of which the following is a copy, to wit (insert copy of lease),—

Wherefore petitioner prays that an order be entered herein authorizing, empowering, and directing the executor (administrator or guardian) of said estate to lease said property in accordance with the terms and conditions of said proposed lease.

Dated —, 18—.

—, Petitioner.

(Verification, Form No. 55, § 80.)

Order to Show Cause why Realty should not be Leased: See Form No. 159, under last section.

Form No. 163.—Order to Lease.

[Title of Court and Estate.]

(Follow Form No. 160, § 222, *ante*, to the end of the recitals therein, and then proceed as follows:)

It is therefore ordered that the executor (administrator or guardian) of said estate be and he is hereby authorized, empowered, and directed to lease for the term of — years, at an annual rental of not less than — dollars, that certain real property situate, lying, and being in the county of —, state of —, and known and described as follows, to wit (description). The terms of said lease shall be as follows (state fully such terms). —, Judge of the — Court.

Dated —, 18—.

Form No. 164.—Lease of Realty of Estate.

This indenture, made the — day of —, A. D. 18—, between —, the duly appointed, qualified, and acting — of the estate of —, deceased, the party of the first part, and —, of the county of —, state of —, the party of the second part, witnesseth:—

That whereas, on the — day of —, A. D. 18—, the — court of the — county of —, state of —, made and entered an order authorizing, empowering, and directing the said party of the first part to lease certain real estate of the said —, deceased, situated in the — county of —, state of —, and specified and particularly described in said order, and which said order is now on file and of record in said court, and is hereby referred to and made a part of this indenture;

And whereas, under any by virtue of said order, said party of the first part has agreed to lease the real estate hereinafter described, on the terms and conditions hereinafter stated, to the party of the second part, for the term of — years,—

Now, therefore, in consideration of the premises, the said party of the first part has letten, and by these presents does let, unto the said party of the second part, all that certain lot, piece, or parcel of land situate, lying, and being in the — county of —, state of —, known and described as follows (description), with the appurtenances, for the term of — from the — day of —. A. D. 18—. at the — rent or sum of —

dollars, — payable — in advance, in equal — payments of — dollars; and it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and to remove all persons therefrom. And the said party of the second part does hereby covenant to pay to the said party of the first part the said — rent herein reserved in the manner herein specified, and not to let or underlet the whole or any part of said premises without the written consent of the said party of the first part; and at the expiration of said term the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear will permit, damages by the elements excepted.

The party of the first part reserves for himself, his agent and attorney, the right to enter to view said premises, and to eject the tenant if he suffer any strip or waste thereof.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

[SEAL] —, Administrator (Executor or Guardian) of the
Estate of —, Deceased.

CHAPTER VIII.

OF THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, AND OF THE MANAGEMENT OF ESTATES.

- § 224. Executors to take possession of the entire estate.
- § 225. Executors may sue and be sued.
- § 226. May maintain actions for waste, etc.
- § 227. May be sued for waste or trespass of decedent.
- § 228. Surviving partner to settle business — Interest to be appraised — Account to be rendered.
- § 229. Actions on bond may be brought by whom.
- § 230. What executors are not parties to actions.
- § 231. May compound.
- § 232. Recovery of property fraudulently disposed of.
- § 233. When executor to sue.
- § 234. Disposition of estate recovered.

§ 224. [1581.] Executors to Take Possession of the Entire Estate. — The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this title.

Arizona. — Same. Rev. Stats., sec. 1184.

Idaho. — Same. Rev. Stats., sec. 5550.

Montana. — Same. Comp. Stats., p. 331, sec. 225.

Nevada. — Same. Gen. Stats., secs. 2863.

Utah. — Same. Comp. Laws, sec. 4197.

Washington. — Same as first sentence of the California section. Code Proc., sec. 1041.

Wyoming. — Same as California. Laws 1890-91, pp. 285, 286, sec. 1.

"The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except . . . and except also that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdic-

tion of the government under which he was invested with his authority": Cal. Code Civ. Proc., sec. 1913.

Executor, etc., may Sell Choses in Action: See § 175, *ante*.

A special property in the real and personal estate of a decedent vests

in the administrator. He becomes a trustee not only to apply it in payment of claims presented, but to perform such acts as the law imposes upon him in carrying out the contracts of his decedent: *Janin v. Browne*, 59 Cal. 38.

The exclusive right to the possession of realty of an estate and of the action to recover it is vested in the administrator pending administration: *Meeks v. Vassault*, 3 Saw. 206.

The heir cannot maintain an action to recover the realty of a deceased person, after administration has commenced upon his estate, until the administration is closed: *Meeks v. Vassault*, 3 Saw. 206.

It is not an executor's duty to pursue an insolvent debtor of his testator's estate, unless he has good grounds to believe that something can be recovered: *In re Stow*, Myr. Prob. 97.

An administrator has no power to compensate an attorney by giving him an interest in the property of the estate for his services in recovering it: *In re Page*, 57 Cal. 238.

An administrator has no power to consent to the laying out of a highway across the lands of the estate: *Rush v. McDermott*, 50 Cal. 471.

The local administration of the estate of a deceased non-resident may be treated as ancillary, and the surplus, after the payment of the local debts and expenses, may, by order of the court, be delivered to the executor or administrator of the domicile, and to that end the latter may apply to the California court for such an order; but beyond such right the executor or administrator of the domicile can have no authority over the local assets: *Lewis v. Adams*, 70 Cal. 403.

To vest the incoming administrator with title to the estate, there must be a grant of administration to him; the mere handing over the papers by the old administrator to the new is not sufficient: *Rogers v. Hoberlein*, 11 Cal. 120; *Beckett v. Selover*, 7 Cal. 216.

Administrator may recover possession of the estate of his decedent from an heir or devisee: *Page v. Tucker*, 54 Cal. 121; *Beckett v. Selover*, 7 Cal. 215; *Harwood v. Marye*, 8 Cal. 580.

The order for the appointment, the qualification of the appointee, and

the issuing of letters to him thereon, are all necessary proceedings to invest such appointee with the office of an administrator of an estate. The appointment is *in fieri* until the appointee has qualified and received his letters: *In re Hamilton*, 34 Cal. 464.

Upon the death of the ancestor, the heir becomes vested with the full property at once. His estate is indefeasible, except to pay debts, costs of administration, etc., and subject to the temporary right of possession of the administrator. The legislature cannot order a sale of his vested interest in his inheritance, any more than it can direct the sale of the property of any other person acquired in any other way: *Brenham v. Story*, 39 Cal. 179.

The title to land under a private land claim vests in the claimant so as to descend among his assets, even though the patent therefor is executed after his death, where the same was surveyed by the United States prior to such death: *Waterman v. Smith*, 13 Cal. 373.

An assignment of funds to pay debts of assignor vests the title in the assignee for the purposes of the trust, and after assignor's death his administrator has no right to them: *Pierce v. Robinson*, 13 Cal. 116.

Administrator may bring action to quiet title to real estate which belonged to his decedent. Such action may be brought by any one who has the right of possession against any one who claims an estate or interest adverse to such right: *Pennie v. Hildreth*, 81 Cal. 127.

The administrator's possession and title to land is not adverse to the heir, but the administrator is in privity with and represents both heirs and creditors; and so far as any but creditors are concerned, the heir in whom the title vests, subject only to the right of the administrator to dispose of the land to pay debts, has the right to the title and possession, and the right to maintain an action and recover possession, as against any one except the administrator, and may convey his title and right of possession while the estate remains undistributed: *Spotts v. Hanley*, 85 Cal. 155.

Where land is inherited, one half from the father, and two thirds of the other half from the mother, whose es-

tate is being administered upon, the heirs cannot, pending the administration of the mother's estate, recover in ejectment the portion inherited from her as against her administrator, who is entitled to the possession of the whole of her estate, and they can only maintain a right of possession as tenants in common with the administrator by reason of inheritance from the father: *Burgel v. Priesser*, 89 Cal. 70.

Executors, administrators, receivers, and trustees are, in their official capacity, indifferent persons, as between the real parties in interest, and cannot litigate any question which arises only between those parties, nor have they any concern as to who shall bear the costs of litigation: *Goldtree v. Thompson*, 83 Cal. 420.

Administrator entitled to possession of property of deceased, real and personal, for the purposes of administration: *Butler v. Smith*, 20 Or. 126.

It is the duty of a domiciliary executor to gather in and account for the foreign assets of his testator to the extent of his conscious ability to do so, and the court of the domicile may compel him to account for willful neglect to perform such duty: *In re Ortiz*, 86 Cal. 306.

Where the will of a resident of this state expressly authorizes the executor to collect all of the assets of the testator, and he has taken domiciliary administration in this state, and ancillary foreign administration, and obtained control of foreign assets of the estate, he may be compelled by the court of the domicile to account for the residuum of the foreign assets, after deducting all proper demands and charges against them, and to distribute such residuum as domiciliary executor, although the ancillary administration of the foreign assets may not have been closed, if it appears that he might have closed it with ordinary diligence, and have had the residuum transferred to him in this state before he filed his final account, and has willfully neglected to do so: *In re Ortiz*, 86 Cal. 306.

Administrator may maintain possessory action to recover the realty of his intestate: *Oury v. Duffield*, 1 Ariz. 509.

Administrator is presumed to have done his duty until the contrary is shown: *Territory v. Mix*, 1 Ariz. 52.

Actions for the possession of realty or damages thereto cannot be maintained by an administrator: *Carhart v. Mont. Co.*, 1 Mont. 245.

A conveyance of land to which a deceased person was entitled before his death, to his administrator as such, puts the legal title in the administrator: *In re Smith*, 4 Nev. 254.

Administrators, while they must act in utmost good faith and must strictly perform official duty, are only bound to perform such duties as are imposed upon them by statute: *Royce v. Hampton*, 16 Nev. 25.

The heir is entitled to recover from a stranger real property which he has inherited, notwithstanding there is an acting executor or administrator of the ancestor's estate: *Gossage v. Crown Point G. & S. M. Co.*, 14 Nev. 153.

An administrator can maintain ejectment for the real property of his intestate, notwithstanding he has obtained the legal title to the premises, and deeded the same to the heirs: *McClelland v. Dickenson*, 2 Utah, 100.

An administrator takes charge of the entire estate, whether it passes to the heir or is otherwise disposed of: *Ward v. Moorey*, 1 Wash. Ter. 104.

A debtor who unauthorizedly pays the debts due from him to an estate is not discharged from liability, and it lies upon him, not the estate, to recover the payment so made: *McCoy v. Ayers*, 2 Wash. Ter. 307.

See § 123, *ante*, and notes.

Limitation on actions which survive: Cal. Code Civ. Proc., sec. 353; *Tynan v. Walker*, 35 Cal. 634.

Executors may sue without joining beneficiaries: Cal. Code Civ. Proc., sec. 369; may sue and be sued: See § 225, *post*.

Heir may Maintain Ejectment, etc., when: See § 123, *ante*; Cal. Code Civ. Proc., sec. 783.

Suggestion of Death of party in pending action: Cal. Code Civ. Proc., sec. 385.

Powers, generally: See § 46, *ante*.

Possession of Estate: See § 123, *ante*.

§ 225. [1582.] Executors may Sue and be Sued.

—Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates.

Arizona. — Same. Rev. Stats., sec. 1185.

Idaho. — Same. Rev. Stats., sec. 5551.

Montana. — Same. Comp. Stats., p. 332, sec. 226.

Nevada. — Same. Gen. Stats., sec. 2864.

Oregon. — "All other causes of action by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. When the cause of action survives as herein provided, the executors or administrators may maintain an action at law thereon against the party against whom the cause of action accrued, or after his death against his personal representatives." Hill's Laws, sec. 370.

Utah. — Same as California. Comp. Laws, sec. 4198.

Washington. — Same as California. Code Proc., sec. 1042.

Wyoming. — Same as California. Laws 1890-91, p. 286, sec. 2.

See last section, and notes.

An administrator has no power to sue to enforce a trust, and to compel a conveyance of land to himself: *Janes v. Throckmorton*, 57 Cal. 387.

A foreign executrix cannot maintain an action in the courts of California without first obtaining ancillary letters testamentary or of administration: *Lewis v. Adams*, 70 Cal. 403.

An action will not lie against an administrator in his representative capacity, and others, to compel a transfer to the estate of real property, to which they have obtained the legal title in such a way as to raise a constructive trust in favor of the estate: *Mesmer v. Jenkins*, 61 Cal. 151.

The executor has the right to maintain suits for the possession of the real property of the estate until the estate is settled: *Grattan v. Wiggins*, 23 Cal. 29; *In re Page*, 57 Cal. 241; *Meeks v. Hahn*, 20 Cal. 627. See § 123, ante.

Action to foreclose mortgage may be against executor without joining the heirs of the deceased mortgagee: *Bayley v. Muehe*, 65 Cal. 345;

see *Emeric v. Penniman*, 26 Cal. 119; *Munch v. Williamson*, 24 Cal. 170.

An administrator has a special property in the personalty of an estate, and need not sue as an administrator, but may maintain a personal action: *Munch v. Williamson*, 24 Cal. 170; *Hum v. Henderson*, 50 Cal. 369.

In actions affecting the realty of an estate, the administrator must be made a party: *Harwood v. Marye*, 8 Cal. 580.

Under the act of April 1, 1872, as to proper parties in actions to enforce street assessments, such an action may be brought against a devisee of the fee of a lot fronting on the street improved to enforce an assessment made after his testator's death, under a contract made before his death, without joining his executors, although the estate has not been finally settled, where it is shown there is sufficient personalty to pay all debts and claims: *Phelan v. Dunne*, 72 Cal. 229.

Title to all choses in action are vested in the executor or administrator, with authority to collect and otherwise dispose of them: *Weider v. Osborn*, 20 Or. 307.

Administrator cannot maintain an action to recover personal property belonging to the estate after he has ceased to be administrator of the estate: *Affierbach v. McGovern*, 79 Cal. 268.

A judgment in ejectment recovered by or against an administrator is an estoppel in favor of or against the heir and those claiming under him; and a judgment recovered in such action by the administrator inures to the benefit of those to whom the sole heir had conveyed prior to the recovery of such judgment: *Spotts v. Hanley*, 85 Cal. 155.

An action will lie in favor of the administrator of an estate against the executors of a deceased administrator of the same estate, to recover the proceeds of a life insurance policy upon the life of the intestate, and the value of other personal property of the estate collected by the deceased administrator and accounted for to the estate: *Curran v. Kennedy*, 89 Cal. 98.

Action by Foreign Executors—Foreclosure of Mortgage—Equitable Estoppel.—Foreign executors to whom, as trustees, a note and mortgage were given by their co-executor for the amount of assets received by

him belonging to the estate may maintain an action to recover the trust funds as mortgages under the terms of mortgage, without taking out letters testamentary in the jurisdiction in which the mortgaged property is situated, and the trust may be enforced indirectly by foreclosure of the mortgage, under the rule of equitable estoppel: *Fox v. Tay*, 89 Cal. 339.

Contract of Decedent—Conclusion upon Administrator and Heirs.—Where a decedent in his lifetime voluntarily, and acting under the advice of the able attorneys, entered into a written agreement for a sufficient, adequate, and valuable consideration, with a full knowledge of all the facts and circumstances of the claim of another person to certain bonds in which he held an interest, by the terms of which he, in effect, transferred all his interest in the bonds to such claimant, and acknowledged him as the owner thereof, and never assumed to rescind the contract or restore the consideration, his administrator and heirs are bound by his acts, and cannot question the validity of the agreement or recover any interest in the bonds: *Jones v. Tallant*, 90 Cal. 386.

§ 226. [1583.] **May Maintain Actions for Waste, etc.**—Executors and administrators may maintain actions against any person who has wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate in his lifetime. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime.

Arizona.—Same. Rev. Stats., sec. 1186.

Idaho.—Same. Rev. Stats., sec. 5552.

Montana.—Same. Comp. Stats., p. 332, sec. 227.

Nevada.—Same. Gen. Stats., sec. 2865.

Utah.—Same. Comp. Laws, sec. 4199.

Washington.—Same. Code Proc., sec. 1043.

Wyoming.—Same. Laws 1890-91, p. 286, sec. 3.

See § 224, *ante*, and notes; *Halleck v. Mixer*, 16 Cal. 575.

§ 227. [1584.] **May be Sued for Waste or Trespass of Decedent.**—Any person or his personal representatives may maintain an action against the executor or

administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person.

Arizona. — Same. Rev. Stats., sec. 1187.

Idaho. — Same. Rev. Stats., sec. 5553.

Montana. — Same. Comp. Stats., p. 332, sec. 228.

Nevada. — Same. Gen. Stats., sec. 2866.

Oregon. — Hill's Laws, sec. 370, under § 225, *ante*.

Utah. — Same as California. Comp. Laws, sec. 4200.

Washington. — Same as California. Code Proc., sec. 1044.

Wyoming. — Same as California. Laws 1890-91, p. 286, sec. 4.

§ 228. [1585.] Estates where Partnership Exists.

— When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him in right of the decedent. Upon the application of the executor or administrator, the court, or a judge thereof, may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal, may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained.

Arizona. — Same. Rev. Stats., sec. 1188.

Idaho. — Same. Rev. Stats., sec. 5554.

Montana. — "When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership property, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised and appropriated as other property; *provided, however,* that the surviving partner is only to be allowed to control the interest of the deceased partner by giving bond in favor of the executor or administrator in a sum equal to the value of the interest of such deceased partner in and to the property of the partnership, said amount to be determined by the probate judge. The surviving partner must settle affairs of the partnership without delay, treating all creditors alike, and giving no preference to

any, except such as are made so by mortgage, pledge, or lien, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him in the right of the decedent. Upon application of the executor or administrator, the probate judge may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal, may, after notice, compel it by attachment, and the executor or administrator may maintain against him any action which the decedent could have maintained." *Laws 1889, p. 146, amending Comp. Laws, p. 332, sec. 229.*

Nevada. — Same. *Gen. Stats., sec. 2867.*

Oregon. — "The executor or administrator of a deceased person, who was a member of a copartnership, shall include in the inventory of such person's estate, in a separate schedule, the whole of the property of such partnership; and the appraisers shall estimate the value thereof, and also the value of such person's individual interest in the partnership property, after the payment or satisfaction of all the debts and liabilities of the partnership." *Hill's Laws, sec. 1101.*

"After the inventory is taken, the partnership property shall be in the custody and control of the executor or administrator, for the purposes of administration, unless the surviving partner shall, within five days from the filing of the inventory, or such further time as the court or judge may allow, apply for the administration thereof, and give the undertaking therefor hereinafter prescribed." *Hill's Laws, sec. 1102.*

"If the surviving partner apply therefor, as provided in the last section, he is entitled to the administration of the partnership estate, if he have the qualifications and competency required for a general administrator. He is denominated an administrator of the partnership, and his powers and duties extend to the settlement of the partnership business generally, and the payment or transfer of the interest of the deceased in the partnership property remaining after the payment or satisfaction of the debts and liabilities of the partnership, to the executor or general administrator within six months from the date of his appointment, or such further time, if necessary, as the court or judge may allow. In the exercise of his powers and the performance of his duties, the administrator of the partnership is subject to the same limitations and liabilities, and control and jurisdiction of the court, as a general administrator." *Hill's Laws, sec. 1103.*

"The undertaking of the administrator of the partnership shall be in a sum not less than double the value of the partnership property, and shall be given in the same manner, and be to the same effect, as the undertaking of a general administrator." *Hill's Laws, sec. 1104.*

"In case the surviving partner is not appointed administrator of the partnership, the administration thereof devolves upon the executor or general administrator; but before entering upon the duties of such administration he shall give an additional undertaking in double the value of the partnership property." *Hill's Laws, sec. 1105.*

"Every surviving partner, on the demand of an executor or administrator of a deceased partner, shall exhibit and give information concerning the prop-

erty of the partnership at the time of the death of the deceased partner, so that the same may be correctly inventoried and appraised; and in case the administration thereof shall devolve upon the executor or administrator, such survivor shall deliver or transfer to him, on demand, all the property of the partnership, including all books, papers, and documents pertaining to the same, and shall afford him all reasonable information and facilities for the performance of the duties of his trust." Hill's Laws, sec. 1106.

"Any surviving partner who shall refuse or neglect to comply with the requirements of the last section may be cited to appear before the court or judge, and unless he show cause to the contrary, the court or judge shall require him to comply with such section in the particular complained of." Hill's Laws, sec. 1107.

Utah. — Same as California. Comp. Laws, sec. 4201.

Washington. — Same as Oregon. Code Proc., secs. 947-953.

Wyoming. — Same as California. Laws 1890-91, p. 286, sec. 5.

No claim need be presented against the estate of a deceased managing partner, for the allowance and approval of the administratrix and probate court, before bringing an action by the representative of a co-partner against the administratrix of the deceased managing partner for an accounting and settlement of the affairs of the partnership, and for the delivery of certain property claimed to have been held in trust by the deceased managing partner for his co-partner, who left the partnership business in charge of such managing partner: *Roach v. Caraffa*, 85 Cal. 436.

A decedent's interest in a partnership may be sold: See § 174, *ante*.

The surviving partner is entitled to the possession and control of partnership realty, even though it stands in the name of the deceased partner: *Gray v. Palmer*, 9 Cal. 616.

Surviving partner has the exclusive right of possession, and the absolute power of disposal of the partnership property: *People v. Hill*, 16 Cal. 113.

The surviving partner is a trustee for the purpose of winding up the affairs of the firm, and is accountable for the value of the use and occupation of the landed estate of the partnership. He is bound to account for and pay over to the administrator of the deceased partner all profits arising out of partnership transactions. This is true, even though he has purchased the interest of all the heirs: *Smith v. Walker*, 38 Cal. 385.

The probate court has jurisdiction

to require a surviving partner, who does not deny that a partnership between himself and the decedent formerly existed, to file an account of the partnership affairs, and, as an incident thereto, to examine such survivor as to the sufficiency of the account filed: *Andrade v. Superior Court*, 75 Cal. 459.

The executor of the last survivor of a firm has a right to the possession of the partnership assets, and holds them subject to the same trusts as did such survivor: *Theller v. Such*, 57 Cal. 460.

The administrator of a deceased partner has no authority to intermeddle with partnership affairs, except to call upon the surviving partner to close up the business of the partnership and account to him: *Tompkins v. Weeks*, 26 Cal. 51.

Upon an accounting between a surviving partner and the administrator of a deceased partner, if it appears that the estate of the deceased is indebted to the former, it is not necessary that he should present his claim to the administrator, in order to entitle him to an allowance therefor in a settlement: *Manuel v. Escolle*, 65 Cal. 110.

A surviving partner's claim is contingent within the meaning of § 284, *ante*, until the partnership affairs are settled: *Gleason v. White*, 34 Cal. 263.

The administrator of a partnership has no power, and the county court as a court of probate cannot empower him, to partition real property: *Burnside v. Savier*, 6 Or. 154.

If a surviving partner is appointed executor of deceased partner's will, he must first settle partnership business, and afterwards the individual estate of testator: *Palicio v. Bigne*, 15 Or. 142.

If bond is waived by deceased partner in the will, nominating surviving partner as executor, the latter will still be required to give bond as administrator of the partnership estate: *Palicio v. Bigne*, 15 Or. 142.

When one of the members of a firm who are makers of a negotiable promissory note dies before the maturity of the note, presentment should be made to and demand of the surviving maker, and not the executor of the deceased partner. In such case

it is not required that the claim be presented to the administrator of the deceased partner for allowance before commencing suit against the surviving partner: *Barlow v. Cogan*, 1 Wash. Ter. 257.

Firm debts cannot be collected out of the assets of the estate of a deceased partner until the firm property is exhausted: *Barlow v. Cogan*, 1 Wash. Ter. 257.

In the absence of statutory provision, a surviving partner has exclusive control of partnership effects. Suits must be brought by and against him for partnership demands and liabilities: *Barlow v. Cogan*, 1 Wash. Ter. 257.

Form No. 165.—Petition that Partners of Deceased Render an Account.

[Caption, Form No. 1, § 5, *ante*.]

1. That he is the duly appointed, qualified, and acting administrator of the estate of —, deceased;

2. That at the time of his death, and for a long time prior thereto, said — was a member of the firm of — & Co., who were doing business in the city of —, state of —, as wholesale grocers;

3. That — and — are the surviving members of said firm, and since the death of said deceased have been settling up the business thereof;

4. That they have rendered an account to your petitioner, purporting to be a full account of the affairs of said partnership, but your petitioner is informed and believes that the same does not exhibit a full, true, and particular statement of all the affairs, property, effects, and assets of the said copartnership, and of their dealings as such surviving partners with the same, and of the true value and condition of the interest of the said deceased at and since his death;—

Wherefore your petitioner prays for an order directed to the said — and —, requiring them to render a full, true, and particular statement and account of all the affairs, property, effects, and assets of the said copartnership, and of their dealings with the same at the time of and since the death of the said deceased, showing the true value and condition of the in-

terest of said deceased, and the moneys, if any, due and owing to your petitioner as his said executor, and all other necessary and proper matters and things in the premises.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 166. — Order Requiring Surviving Partner to Account to Administrator.

[Title of Court and Estate.]

It appearing from the petition of —, the administrator of the estate of —, deceased, this day filed, that —, the surviving partner of said decedent, should render an account to said administrator, —

It is hereby ordered that said —, surviving partner as aforesaid, be cited to render an account of the partnership affairs of himself and said decedent, and to file the same in this court within ten days from this date, or that within said time he show cause to this court why said account should not be rendered.

—, Judge of the — Court.

Dated —, 18—.

§ 229. [1586.] Actions on Bond, Brought by Whom.

— An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate.

Arizona. — Same. Rev. Stats., sec. 1189.

Idaho. — Same. Rev. Stats., sec. 5555.

Montana. — Same. Comp. Stats., p. 332, sec. 230.

Nevada. — Same. Gen. Stats., sec. 2868.

Utah. — Same. Comp. Laws, sec. 4202.

Washington. — Same. Code Proc., sec. 1045.

Wyoming. — Same. Laws 1890-91, p. 286, sec. 6.

§ 230. [1587.] What Executors are not Parties to Actions. — In actions by or against executors, it is not necessary to join those as parties to whom letters were issued, but who have not qualified.

Arizona. — Same. Rev. Stats., sec. 1190.

Idaho. — Same. Rev. Stats., sec. 5556.

Montana. — Same. Comp. Stats., p. 332, sec. 231.

Nevada. — Same. Gen. Stats., sec. 2869.

Utah. — Same. Comp. Laws, sec. 4203.

Wyoming. — Same. Laws 1890-91, p. 286, sec. 7.

§ 231. [1588.] **May Compound.** — Whenever a debtor of a decedent is unable to pay all his debts; the executor or administrator, with the approbation of the court, or a judge thereof, may compound with him, and give him a discharge, upon receiving a fair and just dividend of his effects. A compromise may also be authorized, when it appears to be just, and for the best interest of the estate.

Arizona. — Same. Rev. Stats., sec. 1191.

Idaho. — Same. Rev. Stats., sec. 5557.

Montana. — Same. Comp. Stats., p. 332, sec. 232.

Nevada. — Same. Gen. Stats., sec. 2870.

Oregon. — Same. Hill's Laws, sec. 1182.

Utah. — Same as California. Last sentence omitted. Comp. Laws, sec. 4104.

Washington. — Same as Oregon, *supra*. Code Proc., sec. 1046.

Wyoming. — Same. Laws 1890-91, p. 286, sec. 8.

Executors and administrators have the legal right to compound and discharge debts due to their testator or intestate: *Moulton v. Holmes*, 57 Cal. 337; *In re Dunne*, 58 Cal. 543.

The above section is not restrictive of the common-law powers of executors and administrators: *Moulton v. Holmes*, 57 Cal. 337.

An executor has authority, with the approval of the probate court, to compromise an

action for damages for injuries resulting in the death of his testator, owing to the negligence of the defendant: *Hartigan v. S. P. Co.*, 86 Cal. 142.

An agreement by an administratrix to accept in full satisfaction of a judgment due the estate a note of judgment debtor, for a sum less than the amount for which the judgment was rendered, is null and void, and the note so given is without consideration: *Siddall v. Clark*, 89 Cal. 321.

Form No. 167. — Petition to Compromise a Debt.

[Caption, Form No. 1, § 5, *ante*.]

1. That petitioner is the duly appointed, qualified, and acting administrator (or executor) of the estate of —, deceased;
2. That there has come to the possession of your petitioner, as such administrator (or executor), a promissory note against —, dated the — day of —, A. D. 18—, for the sum of \$—, with interest at the rate of one per cent per month;
3. That said — is financially embarrassed, and offers to pay one half of the principal amount of said note in liquidation of

the same, and it is to the best interest of said estate that his said offer be accepted;—

Wherefore your petitioner prays that he may be authorized to compromise said note by accepting from said — the sum of \$—, being one half of the principal amount of said note.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 168. — Order to Compromise a Debt.

[Title of Court and Estate.].

The petition of —, the administrator of the above-entitled estate, asking authority to compromise a claim against —, coming on for hearing this day, and it appearing that there has come into the hands of said administrator a promissory note against said —, dated the — day of —, A. D. 18—, for the sum of — dollars, with interest at the rate of one per cent per month; that the said — is financially embarrassed, and offers to pay one half of the amount of the principal of said note in full satisfaction of said claim, and it appearing that it is for the best interest of said estate that said offer be accepted,—

It is therefore ordered that said administrator compromise said claim by accepting in full satisfaction thereof one half of the principal sum of said note, to wit, \$—.

Dated —, 18—.

—, Judge of the — Court.

§ 232. [1589.] Recovery of Property Fraudulently Disposed of.—When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate, or any rights and interests therein, with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditor all such real estate so fraudulently conveyed; and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights, or credits which have been so conveyed

by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance.

Arizona.—Same. Rev. Stats., sec. 1192.

Idaho.—Same. Rev. Stats., sec. 5558.

Montana.—Same. Comp. Stats., p. 333, sec. 233.

Nevada.—Same. Gen. Stats., sec. 2871.

Oregon.—Same, except that the executor or administrator must apply by petition to the court for leave to commence and prosecute such suits. Hill's Laws, sec. 1167.

"If upon the application it appear to such court or judge that the assets are insufficient for the purposes specified in the last section, and that it is probable that the conveyance, transfer, judgment, or decree was made, suffered, consented to, or procured with the intent or in the manner specified in the last section, it shall make the order directing the proceedings to be commenced and prosecuted as to any or all of the matters alleged in the petition, and necessary to supply the deficiency in the assets." Hill's Laws, sec. 1168.

Utah.—Same as California. Comp. Laws, sec. 4205.

Washington.—Same as California. Code Proc., sec. 1047.

Wyoming.—Same as California. Laws 1890-91, p. 287, sec. 9.

See Cal. Code Civ. Proc., sec. 369; also §§ 123, 224-226, *ante*.

Fraudulent Conveyances: See §§ 233, 234, *post*.

There is no question of the power of the administrator to sue for the recovery of any property, real or personal, or for its possession: *In re Page*, 57 Cal. 241; *Peck v. Brumagim*, 31 Cal. 442; *Hills v. Sherwood*, 48 Cal. 393.

A special administrator may bring the suits mentioned in the

above section: *Forde v. Exempt Fire Co.*, 50 Cal. 299.

The suit may be commenced within three years after the creditors recover judgment against the estate: *Forde v. Exempt Fire Co.*, 50 Cal. 299.

A claim to subject property fraudulently conveyed by decedent to a judgment is not barred because not presented in ten months: *O'Doherty v. Toole*, Sup. Ct. Ariz., Sept. 25, 1887.

§ 233. [1590.] When Executor to Sue.—No executor or administrator is bound to sue for such estate, as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor, as the court, or a judge thereof, shall direct.

Cited in *Mesmer v. Jenkins*, 61 Cal. 151.

Arizona.—Same. Rev. Stats., sec. 1193.

Idaho.—Same. Rev. Stats., sec. 5559.

Montana.—Same. Comp. Stats., p. 333, sec. 234.

Nevada.—Same. Gen. Stats., sec. 2872.

Oregon.—See Hill's Laws, sec. 1167, under last section.

Utah.—Same as California. Comp. Laws, sec. 4206.

Washington. — Same as California. Code Proc., sec. 1048.

Wyoming. — Same as California. Laws 1890-91, p. 287, sec. 10.

A person whose claim against an estate has been disallowed by the administratrix, and for the establishment of which as a claim an action is pending and undetermined, is not a creditor within the meaning of the above section: *Ohm v. Superior Court*, 85 Cal. 545.

An order of the court directing one of the alleged creditors of an estate to commence and prosecute an action in the name of the administratrix is without authority under the statute, and will be annulled on certi-

orari by the supreme court, as the creditor has his remedy independently of the administratrix; and the court can compel the administratrix to bring suit in a proper case, and enforce its order by proceedings for contempt: *Ohm v. Superior Court*, 85 Cal. 545.

The statute of limitations does not bar an action by the creditor to set aside a conveyance by the intestate until three years after the judgment establishing the creditor's claim, if disallowed by the administrator: *Ohm v. Superior Court*, 85 Cal. 545.

Form No. 169. — Application of Creditors for Executor to Bring Action to Recover Property Fraudulently Disposed of by Decedent.

[Title of Court and Estate.]

The application of — and — respectfully shows: —

1. That they are creditors of the estate of —, deceased, to the aggregate amount of \$—; that their respective claims have been duly presented to the administrator (or executor) and allowed by him, and have also been approved by a judge of this court, and are filed herein, and are ranked among the acknowledged debts of the estate;

2. That there is a deficiency of assets in the hands of the administrator (or executor) of the estate to pay the claims of petitioners, as is shown by the inventory and appraisement on file, and by the account of the administrator (or executor) of said estate heretofore filed herein, which are hereby referred to and made a part hereof;

3. That in his lifetime deceased was possessed of the following described real estate, to wit (description), and also of the following goods and chattels, to wit (description);

4. That on the — day of —, A. D. 18—, he conveyed all of said property to one —, which petitioners are informed and believe, and therefore allege, was done by said —, now deceased, and accepted by said —, willfully, knowingly, and fraudulently, and with an intent on the part of each of them to defraud the creditors of —, now deceased, and to hinder and

delay them from collecting the amounts justly due to them from him;

5. That said estate and property if now in the hands of the administrator (or executor) of said deceased would pay off a large amount of the debts due petitioners;

6. That petitioners have made application to said administrator (or executor) to commence and prosecute to final judgment an action for the recovery of said property on behalf of said estate, and have offered and now offer to pay such part of the costs and expenses of the suit, or give such security to said administrator (or executor) therefor, as this court shall direct; but said administrator (or executor) has wholly neglected and refused to prosecute such action;—

Wherefore petitioner prays that a citation be issued, requiring him to show cause why he should not commence and prosecute said action on payment of such part of the costs thereof, or upon giving such security therefor, as this court may direct.

— } Applicants.

—, Attorney for Applicants.

Form No. 170. — Order Directing Administrator to Recover Property Fraudulently Disposed of by Decedent.

[Title of Court and Estate.]

The application of — and —, creditors of the above-named estate, praying for an order of this court requiring the administrator of said estate to proceed and recover certain property which it is alleged said decedent fraudulently disposed of in his lifetime, and it appearing from said petition, and the proofs adduced at the hearing thereof, that said applicants are creditors of the estate of said decedent; that there is not sufficient assets in the hands of said administrator to pay their said claims; that in his lifetime said decedent was possessed of the real and personal property hereinafter described; that said deceased during his lifetime willfully, knowingly, and fraudulently, and with an intent to defraud his creditors, and to hinder and delay them from collecting the amounts justly due to them from him, conveyed to — said real and personal property, —

It is therefore ordered that said administrator forthwith commence an action, and prosecute the same to final judgment, to recover said property, which is described as follows, to wit (here insert description); and it is further ordered that said applicants give to said administrator a bond, to be approved by this court, in the penal sum of — dollars, conditioned that said applicants will pay to said administrator, on his demand, from time to time, a sum sufficient to pay the costs and expenses of such action, and also counsel fees therein, and to keep said administrator and said estate harmless from all expense on account of said action; and it is further ordered that in case said action is successfully prosecuted, said administrator shall refund to said applicants, out of the property so recovered, all the expenses of said action which may have been paid by them.

—, Judge of the — Court.

Dated —, 18—.

§ 234. [1591.] Disposition of Estate Recovered.

— All real estate so recovered must be sold for the payment of debts in the same manner as if the decedent had died seised thereof, upon obtaining an order therefor from the court; and the proceeds of all goods, chattels, rights, and credits so recovered must be appropriated in payment of the debts of the decedent in the same manner as other property in the hands of the executor or administrator.

Arizona. — Same. Rev. Stats., sec. 1194.

Idaho. — Same. Rev. Stats., sec. 5560.

Montana. — Same. Comp. Stats., p. 333, sec. 235.

Nevada. — Same. Gen. Stats., sec. 2873.

Oregon. — "The property recovered by means of any proceeding in pursuance of the last two sections is to be sold and appropriated to supply the deficiency mentioned in section 1166, in the same manner as other like property; but the right to or interest in the surplus, if any, remains as if such proceeding had not been allowed or commenced." Hill's Laws, sec. 1169.

Utah. — Same as California. Comp. Laws, sec. 4207.

Washington. — Same as California. Code Proc., sec. 1049.

Wyoming. — Same as California. Laws 1890-91, p. 287, sec. 11.

An executor cannot convey the estate, and sold for the payment of debts, in the same manner as if the deceased had died seised thereof: *In re Page*, 57 Cal. 241.

part of the land recovered to an attorney as his contingent fee for recovering it, but the property when recovered must be inventoried as assets of

CHAPTER IX.

OF THE CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS IN CERTAIN CASES.

- § 235. Contracts for sale of real estate to be completed.
- § 236. Petition for conveyance, and notice of hearing.
- § 237. Interested parties may contest.
- § 238. Conveyances, when ordered to be made.
- § 239. Execution of conveyance, and record thereof.
- § 240. Rights of petitioner to enforce contract.
- § 241. Effect of conveyance.
- § 242. Effect of recording a copy of the decree.
- § 243. Recording decree does not supersede power of court to enforce it.
- § 244. Where party to whom conveyance to be made is dead.
- § 245. Decree may direct possession to be surrendered.

§ 235. [1597.] Contracts for Sale of Real Estate to be Completed.—When a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto.

Arizona.—Same. Rev. Stats., sec. 1195.

Idaho.—Same. Rev. Stats., sec. 5505.

Montana.—Same. Comp. Stats., p. 334, sec. 236.

Nevada.—Same. Gen. Stats., sec. 2874.

Utah.—Same. Comp. Laws, sec. 4208.

Washington.—“If any person who is bound by contract in writing to convey any real property shall die before making the conveyance, the superior court of the county in which such real estate, or any portion thereof, is situate may make a decree authorizing and directing his executor or administrator to convey such real property to the person entitled thereto.” Code Proc., sec. 1117.

Wyoming.—Same as California. Laws 1890-91, p. 284, sec. 50.

§ 236. [1598.] Petition for Conveyance, and Notice of Hearing.—On the presentation of a verified petition by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which

the claim is predicated, the court, or judge thereof, must appoint a time and place for hearing the petition, and must order notice thereof to be published at least four successive weeks before such hearing, in such newspaper in this state as he may designate.

Arizona. — Same. Rev. Stats., sec. 1196.

Idaho. — Same. Rev. Stats., sec. 5566.

Montana. — Same. Comp. Stats., p. 334, sec. 237.

Nevada. — Same. Gen. Stats., sec. 2875.

Utah. — Same, with the following added: "Or by posting notices in at least three public places in the county." Comp. Laws, secs. 4209.

Washington. — "On filing and presentation of a petition of any person claiming to be entitled to such conveyance under such contract, setting forth the facts upon which such claim is predicated, the court, or the judge thereof, shall make an order appointing a time for hearing such petition, and shall also order notice thereof, and of the time of the hearing, to be published four successive weeks next before such hearing, in such newspaper in the state as the court shall designate; and in case such deceased person was an inhabitant of this state at the time of his death, or died in this state, and in all other cases in which an executor or administrator has been appointed in this state, the court shall further order that the notice be personally served upon the executor or administrator, by delivery to him of a copy of the same, together with a copy of the petition." Code Proc., sec. 1118.

Proceedings where there is No Executor, etc. — "If the deceased died out of the state, and was not an inhabitant thereof at the time of his death, and no executor or administrator shall have been appointed in this state, such conveyance shall be executed by a commissioner to be appointed by the court, in the decree for that purpose; but in such case, in addition to the notice provided for in section 1118 [*supra*], it shall appear to the satisfaction of the court, at the hearing, that the executor or administrator of such deceased duly appointed in another state, territory, or country, or his heirs or devisees, shall have had reasonable notice personally of the pendency of said petition, and of the time and place appointed for such hearing, and such foreign executor or administrator shall have the same right to file objections, and resist the claim of the petitioners, as an executor or administrator appointed under the laws of this state would have; and it shall not be necessary, in such case, that an administration of the estate of the deceased be had in the state to authorize the decree of conveyance prayed for." Code Proc., sec. 1122.

Wyoming. — Same as California. Laws 1890-91, p. 234, sec. 51.

Verification: Cal. Code Civ. Proc., sec. 446.

Petition: See § 170, *ante*.

Notice: See § 315, *post*.

In a proceeding to compel an administrator to execute a conveyance of real estate under a written contract to convey, made by the deceased during his lifetime, the petition must state that the contract was in writing, in order to give the court jurisdiction: *Cory v. Hyde*, 49 Cal. 409.

Form No. 171. — Petition for an Order Directing a Conveyance of Real Estate by an Executor or Administrator.

[Caption, Form No. 1, § 5, *ante*.]

1. That on the — day of —, A. D. 18—, petitioner entered into an agreement in writing concerning real estate with —;

2. That said agreement was duly executed and acknowledged by said parties thereto; that the same was duly delivered by said —, and was on the — day of —, A. D. 18—, filed for record in the county recorder's office of the — county of —, state of —, that being the county in which such real property is situated, and was duly recorded in Book — of Deeds, page —; that said agreement is annexed hereto, is hereby referred to and made a part hereof;

3. That petitioner has performed all of the matters and things required by said agreement to be performed by him, and by reason of the premises is entitled to a specific performance of said agreement according to the terms thereof, to wit, a conveyance of the premises described in said instrument;

4. That before petitioner became so entitled to such specific performance, to wit, on the — day of —, A. D. 18—, said — died;

5. That in the matter of the estate of said deceased, such proceedings were had in the — court of the county of —, in this state; that on the — day of —, A. D. 18—, — was, by the order of said court, duly appointed the administrator (or executor) of said estate; that subsequently he filed his bond and took the oath of office as such administrator (or executor), and is now the duly qualified and acting administrator (or executor) of said estate; —

Wherefore petitioner prays that an order of this court be made and entered in the matter of said estate, authorizing and requiring the said administrator (or executor) thereof to specifically perform said agreement, by executing to petitioner a good and sufficient conveyance of the real property described herein and in said agreement.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 172. — Order Appointing Time for Hearing Petition for Specific Performance of a Contract to Convey.

[Title of Court and Estate.]

On reading and filing the petition of —, praying for an order requiring the administrator of the above-named estate to specifically perform the agreement of his decedent, by executing to said petitioner a conveyance of the following described real property to wit (here insert description), —

It is ordered that —, the — day of —, A. D. 18—, be and the same is hereby appointed as the time, and the courtroom of the above-entitled court as the place, for the hearing of said petition, and the clerk of this court is hereby directed to publish a notice thereof in the —, a newspaper published in the county of —, in this state, for at least four successive weeks before said hearing.

Dated —, 18—.

—, Judge of the — Court.

§ 237. [1599.] Interested Parties may Contest. —

At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon satisfactory proof, by affidavit or otherwise, of the due publication of the notice, the court must proceed to a hearing, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court may examine, on oath, the petitioner and all who may be produced before him for that purpose.

Arizona. — Same. Rev. Stats., sec. 1197.

Idaho. — Same. Rev. Stats., sec. 5567.

Montana. — Same. Comp. Stats., p. 334, sec. 238.

Nevada. — Same. Gen. Stats., sec. 2876.

Utah. — Same, except that after the word "notice" the following is interpolated: "Or posting thereof." Comp. Laws, sec. 4210.

Washington. — "At the time appointed for such hearing, or at such other time as the same may be adjourned to, upon proof of the publication of the notice, and of personal service thereof where personal service is required, the court shall proceed to a hearing, and all persons interested as creditors, heirs, devisees, or personal representatives may appear and resist such petition, by filing their objections in writing, and the court shall examine, on oath, the petitioners, and all witnesses who may be produced on the hearing by any interested party for that purpose." Code Proc., sec. 1119.

Depositions may be Used on Hearing. — "The testimony of witnesses in support of the claim of the petitioner may be taken by deposition whenever the deposition of such witnesses might be taken to be used in the trial of a civil action; but notice of the time and place of taking such deposition shall be published by the petitioner, in the paper required to be designated by section 1118, for three successive weeks prior to taking the same, which notice shall also state the name of the officer before whom the deposition is to be taken, and the name[s] of the witnesses whose testimony is proposed to be taken at such time and place, and shall also be served personally in all cases wherein personal service of the notice is required by the provisions of section 1118 [§ 236, *ante*]. Any party interested in the estate may appear and cross-examine such witnesses, and the manner of examination and the form of such deposition shall be in conformity with the statute regulating depositions of witnesses in civil actions. Any party interested in the estate, and resisting the claim of the petitioner may, after filing his objections, take the testimony of witnesses in his behalf in like manner as in civil actions." Code Proc., sec. 1127.

Wyoming. — Same as California, except that these words are omitted, to wit, "upon satisfactory proof, by affidavit or otherwise, of the due publication of the notice, the court," and in lieu thereof these words are inserted, to wit, "the court or judge." Laws 1890-91, p. 284, sec. 52.

Affidavit of Publication: See form under § 315, *post*.

Form No. 173. Objections to the Granting of an Order Directing a Conveyance of Real Estate by an Executor or Administrator.

[Title of Court and Estate.]

—, the residuary legatee under the last will and testament of —, deceased, objects to the granting of the order prayed for in the petition of —, heretofore filed herein, and alleges,—

1. That no notice of the hearing of said petition has ever been published, as required by the order of this court;

2. That the alleged contract between petitioner and said deceased is void; that it was procured from said deceased by the duress and fraud of said petitioner, in this (state the facts out of which said duress and fraud arises as particularly as should be done in a complaint in equity setting up duress and fraud);

3. (State any other causes which would have been a defense to decedent in an action for the specific performance of the contract set forth);—

Wherefore he prays that the order sought in said petition be denied.

—, Attorney for said Legatee.

§ 238. [1600.] Conveyances, when Ordered to be Made. — If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner must be made, entered on the minutes of the court, and recorded.

Arizona. — Same. Rev. Stats., sec. 1198.

Idaho. — Same. Rev. Stats., sec. 5568.

Montana. — Same. Comp. Stats., p. 334, sec. 239.

Nevada. — Same. Gen. Stats., sec. 2877.

Utah. — Same. Comp. Laws, sec. 4211.

Washington. — Same. Code Proc., sec. 1120.

Wyoming. — Same. Laws 1890-91, p. 284, sec. 53.

The court has no authority to order the executor upon his petition, on the receipt of money loaned, to reconvey real property conveyed to his testator by deed absolute on its face, but intended as a mortgage: *Anderson v. Fisk*, 41 Cal. 308.

An order directing the conveyance mentioned in this section is appealable: *In re Corwin*, 61 Cal. 160.

A will operates only upon so much of the estate as the deceased had not contracted to sell: *Bruck v. Tucker*, 32 Cal. 425.

The above and following sections relate to specific performance of contracts of deceased persons, to be

executed by probate courts: *In re Corwin*, 61 Cal. 163.

The above section does not empower the court to direct an administrator to specifically perform a contract for the conveyance of land, made by the intestate, unless the contract was in writing: *Cory v. Hyde*, 49 Cal. 469.

A statute providing that specific performance by an administrator of contracts made by his decedent for the conveyance of land may be decreed by the probate court is not unconstitutional: *Adams v. Lewis*, 5 Saw. 229.

Form No. 174. — Decree Authorizing and Directing Administrator to Specifically Execute Contract of Decedent.

[Title of Court and Estate.]

Now, on this — day of —, A. D. 18—, the petition of — coming on regularly to be heard, and upon the proofs adduced it appearing to this court that —, deceased, entered into an agreement in writing to convey the real estate herein-after described to —, upon certain conditions; that said agreement was duly executed and acknowledged by the parties thereto; that the same was duly delivered and recorded; that said petitioner has performed all of the conditions precedent required to be performed by the terms of said contract,

and is entitled to a conveyance of said premises, according to the terms of said agreement,—

Wherefore, it is hereby ordered, adjudged, and decreed that —, the administrator of the estate of —, deceased, be and he is hereby required to specifically perform said agreement, by executing to petitioner, —, a conveyance of the following described real property, to wit (here insert description).

Dated —, 18—.

—, Judge of the — Court.

§ 239. [1601.] Execution of Conveyance, and Record thereof.—The executor or administrator must execute the conveyance according to the directions of the decree, a certified copy of which must be recorded with the deed in the office of the recorder of the county where the lands lie, and is *prima facie* evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance.

Arizona.—Same. Rev. Stats., sec. 1199.

Idaho.—Same. Rev. Stats., sec. 5569.

Montana.—Same. Comp. Stats., p. 335, sec. 240.

Nevada.—Same, with the following prefixed: "Any person interested may appeal from such decree to the district court for the same county, as in other cases; but if no appeal be taken from such decree within the time limited therefor by law, or if such decree be affirmed on appeal, it shall be the duty of the executor or administrator to execute," etc.; also the words "*prima facie*" is inserted before the word "evidence." Gen. Stats., sec. 2878.

Utah.—Same as California. Comp. Laws, sec. 4212.

Washington.—"Such conveyance shall be executed by the executor or administrator of the estate of the deceased, if the deceased was a resident of or had his place of abode at the time of his death in this state, or if he died therein, or if an executor or administrator has been appointed therein; but in such case no decree for conveyance shall be made unless the executor or administrator shall have been served with a copy of the said petition, and the notice provided for in section 1118 [§ 236, *ante*], at least twenty days prior to the time appointed for the hearing." Code Proc., sec. 1121.

Deceased Dying out of the State, not an Inhabitant, etc: Code Proc., sec. 1122. See § 236, *ante*.

Recording and Effect of Decree—Appeal.—"Any party interested may appeal therefrom to the supreme court, in the same manner as appeals are taken and prosecuted from final decrees or judgments in equity causes; but if no appeal be taken from such decree within the time limited therefor, or if such decree be affirmed on appeal, it shall be the duty of the executor, administrator, or commissioner to execute and deliver the conveyance accord-

ing to the directions contained in the decree; and a certified copy of the decree shall be recorded with the deed in the office of the auditor of the county where the lands lie, and shall be conclusive evidence of the correctness of the proceedings, and of the authority of the executor, administrator, or commissioner to make such conveyance." Code Proc., sec. 1124.

Wyoming.—Same as California to "decree"; "decree" is changed to "order." The balance of section is omitted. Laws 1890-91, p. 285, sec. 54.

§ 240. [1602.] Rights of Petitioner to Enforce Contract.—If, upon hearing, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the right of the petitioner, who may, at any time within six months thereafter, proceed by action to enforce a specific performance thereof.

Arizona.—Same. Rev. Stats., sec. 1200.

Idaho.—Same. Rev. Stats., sec. 5570.

Montana.—Same. Comp. Stats., p. 335, sec. 241.

Nevada.—Same. Gen. Stats., sec. 2879.

Utah.—Same. Comp. Laws, sec. 4213.

Wyoming.—Same. Laws 1890-91, p. 285, sec. 55.

In re Corwin, 61 Cal. 160; *Hall v. Rice*, 64 Cal. 443.

Form No. 175.—Order Dismissing Petition for an Order Directing a Conveyance of Real Estate by an Executor or Administrator.

[Title of Court and Estate.]

Now, on this — day of —, A. D. 18—, the petition of —, praying for a decree authorizing and directing —, the executor of —, deceased, to convey certain real estate to petitioner, who claims to be entitled thereto under and by virtue of a certain contract in writing, alleged to have been made by decedent during his lifetime, coming on regularly to be heard, and after a full hearing of the matter upon said petition and the objections thereto, and upon an examination of the facts and circumstances of the claim, and the court, being fully advised, finds that the right of petitioner to have a specific performance of the contract mentioned in his petition is doubtful, —

It is therefore ordered that said petition be and the same is hereby dismissed without prejudice to the right of petitioner

to proceed within six months to enforce by action a specific performance of said contract.

Dated —, 18—. —, Judge of the — Court.

§ 241. [1603.] Effect of Conveyance.—Every conveyance made in pursuance of a decree, as provided in this chapter, shall pass the title to the estate contracted for, as fully as if the contracting party himself was still living and executed the conveyance.

Arizona.—Same. Rev. Stats., sec. 1201.

Idaho.—Same. Rev. Stats., sec. 5571.

Montana.—Same. Comp. Stats., p. 335, sec. 242.

Nevada.—Same. Gen. Stats., sec. 2880.

Utah.—Same. Comp. Laws, sec. 4214.

Washington.—“A conveyance executed under the provisions of this chapter shall so refer to the decree authorizing the conveyance that the same may be readily found, but need not recite the record in the case generally, and the conveyance made in pursuance of a decree shall pass to the grantee all the estate, right, title, and interest contracted to be conveyed by the deceased, as fully as if the contracting party himself were still living and executed the conveyance in pursuance of such contract.” Code Proc., sec. 1123.

Wyoming.—Same. Laws 1890-91, p. 285, sec. 56.

Conveyance: See § 200, *ante*, and notes.

§ 242. [1604.] Effect of Recording a Copy of the Decree.—A copy of the decree for a conveyance, as provided in this chapter, duly certified and recorded in the office of the recorder of the county where the lands lie, gives the person entitled to the conveyance a right to the possession of the lands contracted for, and to hold the same, according to the terms of the intended conveyance, in like manner as if they had been conveyed in pursuance of the decree.

Arizona.—Same. Rev. Stats., sec. 1202.

Idaho.—Same. Rev. Stats., sec. 5572.

Montana.—Same. Comp. Stats., p. 335, sec. 243.

Nevada.—Same. Gen. Stats., sec. 2881.

Utah.—Same. Comp. Laws, sec. 4215.

Washington.—“A copy of the decree for conveyance made by the court, and duly certified and recorded in the office of the auditor of the county wherein the land is situate, shall, after affirmance upon appeal, or after expiration of the time for taking an appeal in case no appeal be taken, give to the person entitled to the conveyance a right to the immediate possession of the land contracted for, and of holding the same according to the terms of the intended

conveyance, in like manner and with like effect as if they had been conveyed in pursuance of the decree." Code Proc., sec. 1125.

§ 243. [1605.] Recording Decree does not Supercede Power of Court to Enforce It. — The recording of any decree, as provided in the preceding section, shall not prevent the court making the decree from enforcing the same by other process.

Arizona. — Same. Rev. Stats., sec. 1203.

Idaho. — Same. Rev. Stats., sec. 5573.

Montana. — Same. Comp. Stats., p. 335, sec. 244.

Nevada. — Same. Gen. Stats., sec. 2882.

Utah. — Same. Comp. Laws, sec. 4216.

§ 244. [1606.] Where Party to Whom Conveyance to be Made is Dead. — If the person entitled to the conveyance dies before the commencement of proceedings therefor under this chapter, or before the completion of the conveyance, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent, may, for the benefit of the person so entitled, commence such proceedings, or prosecute any already commenced, and the conveyance must be so made as to vest the estate in the persons entitled to it, or in the executor or administrator for their benefit.

Arizona. — Same. Rev. Stats., sec. 1204.

Idaho. — Same. Rev. Stats., sec. 5574.

Montana. — Same. Comp. Stats., p. 335, sec. 245.

Nevada. — Same. Gen. Stats., sec. 2883.

Utah. — Same. Comp. Laws, sec. 4217.

Washington. — "If the person to whom the conveyance was to be made shall die before the commencement of the proceedings according to the provisions of this chapter, or before the completion of the conveyance, any person who would have been entitled to the conveyance under him, as heir, devisee, or otherwise, in case the conveyance had been made according to the terms of the contract, or the executor or administrator of such deceased person, for the benefit of persons entitled, may commence such proceedings or prosecute the same if already commenced; and the conveyance shall be so made as to vest the estate in the persons who would have been entitled to it, or in the executor or administrator for their benefit." Code Proc., sec. 1126.

Wyoming. — Same as California. Laws 1890-91, p. 285, sec. 57.

§ 245. [1607.] Decree may Direct Possession to be Surrendered. — The decree provided for in this chapter may

direct the possession of the property therein described to be surrendered to the person entitled thereto, upon his producing the deed and a certified copy of the decree, when, by the terms of the contract, possession is to be surrendered.

Arizona. — Same. Rev. Stats., sec. 1205.

Idaho. — Same. Rev. Stats., sec. 5575.

Montana. — Same. Comp. Stats., p. 335, sec. 246.

Utah. — Same. Comp. Laws, sec. 4218.

CHAPTER X.

OF ACCOUNTS RENDERED BY EXECUTORS AND ADMINISTRATORS, AND OF THE PAYMENT OF DEBTS.

ARTICLE I. LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

II. ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.

III. THE PAYMENT OF DEBTS OF THE ESTATE.

ARTICLE I.

LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

- § 246. When executor or administrator personally liable.
- § 247. Executor to be charged with all estate, etc.
- § 248. Not to profit or lose by estate.
- § 249. Uncollected debts without fault.
- § 250. Compensation of the executor and administrator.
- § 251. Not to purchase claims against the estate.
- § 252. Commissions.

§ 246. [1612.] When Executor or Administrator Personally Liable. — No executor or administrator is chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

Arizona. — Same. Rev. Stats., sec. 1206.

Idaho. — Same. Rev. Stats., sec. 5580.

Montana. — Same. Comp. Stats., p. 337, sec. 247.

Nevada. — Same. Gen. Stats., sec. 2884.

Utah. — Same, except that after the word "purpose," the following is interpolated: "Or some memorandum or note thereof." Comp. Laws, sec. 4219.

Washington. — Same. Code Proc., sec. 1050.

Wyoming. — Same as California. Laws 1890-91, p. 287, sec. 1.

Ordinarily, executors and administrators are personally liable upon contracts made by them as such, and supported by some new consideration:

In re Page, 57 Cal. 238; *Dwinelle v. Henriquez*, 1 Cal. 392; *Gurnee v. Maloney*, 38 Cal. 85.

An executor is not liable in an action of unlawful detainer for non- payment of rent: *Martel v. Meehan*, 63 Cal. 47.

§ 247. [1613.] Executor to be Charged with All Estate, etc. — Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisal contained in the inventory, except as provided in the following sections, and with all the interest, profit, and income of the estate.

Arizona. — Same. Rev. Stats., sec. 1207.

Idaho. — Same. Rev. Stats., sec. 5581.

Montana. — Same. Comp. Stats., p. 337, sec. 248.

Nevada. — Same. Gen. Stats., sec. 2885.

Oregon. — Same. Hill's Laws, sec. 1176.

Utah. — Same. Comp. Laws, sec. 4220.

Washington. — Same. Code Proc., sec. 1051.

Wyoming. — Same. Laws 1890-91, p. 287, sec. 2.

See § 248, *post*, and notes.

It is competent for the court to require a statement of the kind of money received by the executor; for that is what the creditors and persons interested in the estate are entitled to have. He holds it as a trustee for their benefit: *Magraw v. McGlynn*, 26 Cal. 429; *In re Den*, 39 Cal. 70; Cal. Code Civ. Proc., sec. 667. See § 90, *ante*.

The executor is chargeable only with the coin value of currency which he has exchanged for coin for the purpose of paying a coin debt of the estate: *In re Sanderson*, 74 Cal. 199.

Each executor of an estate is responsible severally for his own acts, and for money or property which has come to his own hands: *In re Sanderson*, 74 Cal. 199.

Executors should be charged with legal interest upon money of the decedent remaining in their hands, and used by them, or mingled in their own business, when the settlement of the estate is unjustifiably delayed for an unreasonable length of time, although no evidence is introduced to show that the executors derived any benefit by the use of the money. The law requires executors and guardians not only to account for all profits realized from the use of money intrusted

to them, but also for both principal and interest, in case of loss by their unauthorized use of the money: *In re Hilliard*, 83 Cal. 423.

An executor who has money of the estate in his hands, and turns it over to his co-executor, or who actively assists to put it into the hands of his co-executor, is liable for any misapplication of it by the latter, unless it appears that good reasons existed for turning it over, and that in allowing the co-executor to keep, control, and disburse it he acted in good faith, without notice of any purpose to misapply it, and with reasonable prudence and discretion: *In re Osborn*, 87 Cal. 1.

The liability of an executor for misappropriation of assets turned over to his co-executor depends on the circumstances of each case; good faith alone will not save him from liability, if an omitted duty on his part has occasioned the loss, nor will bad faith on the part of the co-executor subject him to liability, if he has omitted no duty on his part, since he has a right to rely upon the honesty of his co-executor, whether he is rich or poor: *In re Osborn*, 87 Cal. 1.

Executor is liable for wrongful acts of a co-executor or co-trustee, to which he consented, or which by his negligence he enabled the latter

to commit, and which he failed to use the means within his power to prevent: *In re Osborn*, 87 Cal. 1.

An executrix having lawful authority to receive the rents and profits of lands devised, in her official capacity, and no authority appearing to receive them in any other capacity, must be presumed to have received the same as assets of the estate, though it is not found that she received them as executrix. Findings of probative facts showing that she did not treat them as assets of the estate in the course of administration do not show that they were not received by her as executrix: *Washington v. Black*, 83 Cal. 290.

Receipt by Foreign Executor — Account. — If assets of an estate situated in a jurisdiction foreign to that in which an executor qualified and received his letters come into his possession while residing in the foreign jurisdiction, by a voluntary payment or administration, he is bound to account for them in the domiciliary jurisdiction: *Fox v. Tay*, 89 Cal. 339.

An executor has no right to give away any of the assets of decedent's estate, though he may consider them worthless: *In re Radovich*, 74 Cal. 536.

Jurisdiction of county court in Oregon in matters of account of executors: *Steele v. Holliday*, 20 Or. 70.

§ 248. [1614.] Not to Profit or Lose by Estate. — He shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss, if the sale has been justly made.

Arizona. — Same. Rev. Stats., sec. 1208.

Idaho. — Same. Rev. Stats., sec. 5582.

Montana. — Same. Comp. Stats., p. 337, sec. 249.

Nevada. — Same. Gen. Stats., sec. 2886.

Oregon. — Same. Hill's Laws, sec. 1177.

Utah. — Same. Comp. Laws, sec. 4221.

Washington. — Same. Code Proc., sec. 1052.

Wyoming. — Same. Laws 1890-91, p. 288, sec. 3.

See preceding section and notes.

An administrator who uses the assets of the estate in his own business, and for his own profit, may be charged interest thereon at the rate of seven per cent per annum, with annual rests: *Merrifield v. Longmire*, 66 Cal. 180.

If an administrator occupies and uses the real estate of his intestate, he becomes the tenant of the estate, and must not only account to the estate for the rental value of the land, but must, if he makes a profit, account for that also. If he sustains a loss, the loss is his. He must at all events pay the rental value of the land: *Walls v. Walker*, 37 Cal. 431.

An administrator who withdraws money belonging to the estate from a

solvent bank, where it had been drawing, and would have continued to draw, interest, when he had sufficient money to pay the debts of the estate and expenses of administration without drawing it, does not thereby become chargeable with interest on the sum thus withdrawn, provided he does not mingle it with his own, or use it for his own profit, or deposit it in a bank in his own name, or neglect to settle his account for a long time: *In re McQueen*, 44 Cal. 584.

An administrator is chargeable with interest on money of the estate drawn by him, and mingled with his own funds, and omitted from his account: *In re Herteman*, 73 Cal. 545.

Where an administrator uses the funds of the estate in his private business, or retains them in his hands for an unreasonable length of time, to the prejudice of the heirs and creditors, he will be charged interest on the same in his settlement: *Walls v. Walker*, 37 Cal. 429.

Executor is chargeable with interest, to be compounded, with annual rests, if he mingles funds of the estate with his own: *In re Stott*, Myr. Prob. 168.

Administrator is not chargeable with interest, if it does not appear that he has used funds of the estate for his own benefit: *In re Beideman*, Myr. Prob. 66.

If the heirs or creditors seek to charge the administrator with interest on funds in his hands, they must show affirmatively that he kept the funds an unreasonable length of time, or used the same in his private business, or derived profit therefrom: *Walls v. Walker*, 37 Cal. 424.

Where an executor is directed by the will to loan out moneys belonging to the estate, and he converts the same and invests it in his own business, he may, at the election of the legatee or other party interested, be held to account either for the interest which he might, with ordinary diligence, have obtained upon a loan of the fund, or for the profit realized from such investment: *In re Holbert*, 39 Cal. 601.

Where an administrator did not keep the funds of the estate separate from his own money, but used them for his own purpose, he is properly chargeable with interest: *In re Gavig*, 42 Cal. 290.

The value of real property lost to the estate by reason of the failure of the administrator to pay taxes, and to pay installments of purchase-money and interest on school lands held under certificate of purchase, he having under his control sufficient money belonging to the estate to pay such taxes, installments, and interest, is properly chargeable to him in his final account: *In re Herteman*, 73 Cal. 545.

Administrator is liable for any loss occasioned for parting with custody of funds for any purpose other than their security: *In re Lacoste*, Myr. Prob. 67; *In re Beideman*, Myr. Prob. 66.

An executor who sells shares of stock for more than the appraised value is liable for the price received and interest to be charged in his accounts: *In re Radovich*, 74 Cal. 536.

If executors are not negligent in selecting an agent to forward moneys of the estate to them, they will not be held responsible for loss occasioned by his insolvency: *In re Taylor*, 52 Cal. 477.

When administrator carries on business of deceased, he does so at his own risk, and though he must account for all profits received, he must bear all losses resulting from failure, and liabilities growing out of his management are not claims which can be enforced against the estate, though he may pay them out of the increase of the business, if not resulting in loss to the estate. They are not charges or expenses of administration, nor are the items of increase and items of expense of such business within the purview of the itemized account regulated by sections 1631 and 1632 of the Code of Civil Procedure, but they should be reported separately to the court, if reported at all. They may be investigated in a civil action, if the administrator is guilty of fraud, but they should not be audited in the administrator's account as part of the probate jurisdiction of the court. But if the probate court debits the administrator in his account with the gross receipts of the business carried on by him, he should also be credited with its expenses: *In re Rose*, 80 Cal. 166.

Executors and administrators must deal with the utmost good faith in all their transactions with or on behalf of the estate they administer, but infallibility of judgment is not required, nor are they held strictly accountable for every mishap: *In re Millenovich*, 5 Nev. 161.

If an executor in the conscientious discharge of his duty sustains a loss by reason of unfortunate circumstances, and not by reason of any violation of law, he should not be held to strict personal accountability for such loss: *In re Millenovich*, 5 Nev. 161.

An administrator and his sureties are liable for money deposited in a bank by an administrator, and allowed to remain after the time when, if he had fulfilled his duty, it would

have been distributed to those entitled, and is lost by the failure of the bank: *McNabb v. Wison*, 7 Nev. 163.

An executor having shares of stock on hand liable to assessment should either get an order of the probate court to sell it, or else, if the estate is solvent without the stock, turn it over to the legatees. He should not borrow money to pay the assessments: *Lucich v. Medin*, 3 Nev. 93.

An administrator is responsible for the rents and profits of his decedent's land, and where he occupies and uses it as his own, he is responsible for all profits made by him out of the land, unless his occupation is shown to be after surrender to a paramount adverse title asserted by another: *In re Misamore*, 90 Cal. 169.

The fact that the heirs of a decedent omit for many years to assert their claim to the rents, issues, and profits of property, of which the administrator of the estate had control,

will not render them guilty of laches so as to estop them from contesting the final account of the administrator, for which he seeks judicial sanction, or precludes them from seeking to charge him with the rents and profits in such account: *In re Misamore*, 90 Cal. 169.

An administrator is not permitted to use the funds of an estate in his hands, or to borrow money upon its credit, for the purpose of making improvements upon the real estate of the deceased, and if he does so, the estate is not chargeable therewith: *Rolfson v. Cannon*, 3 Utah, 232.

An executor is not bound by the duties of his office to pay a bonus above legal interest to secure a loan of money to redeem property belonging to the estate of his testator, which has been sold under the decree of a court having jurisdiction to order the same, nor is he bound to pledge his own securities or use his own credit to secure such loan: *In re Holladay*, 18 Or. 168.

§ 249. [1615.] Uncollected Debts without Fault.

—No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault.

Arizona. — Same. Rev. Stats., sec. 1209.

Idaho. — Same. Rev. Stats., sec. 5583.

Montana. — Same. Comp. Stats., p. 337, sec. 250.

Nevada. — Same. Gen. Stats., sec. 2887.

Oregon. — Same. Hill's Laws, sec. 1177.

Utah. — Same. Comp. Laws, sec. 4222.

Washington. — Same. Code Proc., sec. 1053.

An executor must affirmatively show his inability to collect a note before he is entitled to be credited with the value thereof: *In re Sanderson*, 74 Cal. 199.

Claims due the estate which are considered desperate, and

which are valued in the inventory at nothing, cannot be charged against the executor for failure to collect them, except upon clear proof that he might have done so had he used due diligence: *In re Millenovich*, 5 Nev. 161; Myr. Prob. 98.

§ 250. [1616.] Compensation of the Executor and Administrator. — He shall be allowed all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in courts, and for his services such fees as provided in this chapter; but when the decedent, by his

11, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless, by a written instrument filed in the court, he renounces his claim for compensation provided by the will.

Arizona. — Same. Rev. Stats., sec. 1210.

Idaho. — Same, except that the following: "Including reasonable fees paid attorneys for conducting the necessary proceedings or suits in court," — is omitted. Rev. Stats., sec. 5584.

Montana. — Same as California. Comp. Stats., p. 337, sec. 251.

Nevada. — Same as Idaho. Gen. Stats., sec. 2888.

Oregon. — Same as California, except that written renunciation of compensation must be filed within ten days after the appointment of the executor. Hill's Laws, sec. 1178.

"Notwithstanding the provision in the will for the compensation of an executor, if the estate be insufficient to satisfy the claims against it, the court shall reduce such compensation, so far as may be necessary to satisfy such claims, to an amount equal to what the executor would have been entitled if such provision had been made." Hill's Laws, sec. 1179.

Utah. — Same as California. Comp. Laws, sec. 4223.

Washington. — Same as Idaho. Code Proc., sec. 1054.

Wyoming. — Same as California. Laws 1890-91, p. 288, sec. 5.

Costs Recovered against Executor: See § 163, *ante*.

The estate is not bound for a payment of the fees of an attorney, where the executor was negligent in his duties, and some of the heirs employ such attorney to prosecute the matter and hasten administration: *In re Stuttmeyer*, 75 Cal. 6.

An executor cannot represent either side in a contest respecting the rights of different claimants to the distribution of the estate, and consequently is not entitled to an allowance of fees paid to an attorney for his services in resisting the claim of a disinterested heir: *In re Jessup*, 80 Cal. 625.

Clerk-hire should not be allowed. The law requires executor keep an account. If he employs a clerk for that purpose, it should be at his own expense: *Steele v. Holladay*, Or. 462.

A guardian of a minor, and not a minor, is primarily personally liable for the professional services of an attorney employed by the guardian in the performance of his duties: *Int v. Maldonado*, 89 Cal. 636.

If the guardian pays an attorney's fee, and it is allowed by the probate court as a reasonable expenditure, and necessary to protect the ward's interest, it may be allowed from the ward's estate: *Hunt v. Maldonado*, 89 Cal. 636.

An order made in the superior court after such appeal has been perfected, directing the administrator to make the payment, is beyond the jurisdiction of the superior court, and will be annulled upon certiorari: *Pennie v. Superior Court*, 89 Cal. 31.

Fees for services rendered by attorney to executor as a legatee or in litigating a conflict with estate should not be allowed against the estate: *In re Stott*, Myr. Prob. 168; *In re Chinmark*, Myr. Prob. 128.

Services which should be performed by executor cannot be charged against estate as an attorney fee: *In re Ballentine*, Myr. Prob. 86.

Executor cannot employ broker to sell property on condition that latter shall take as commissions all the property brings above certain price, although such price is a fair valuation of said property, but such broker may be allowed a compensa-

tion by the court: *In re Ballentine*, Myr. Prob. 86.

Reasonable attorney's fees should be allowed in any necessary litigation, or matter of the estate, which requires legal advice or counsel: *Steele v. Holladay*, 20 Or. 462.

Claim for fee of attorney by executor should be in an itemized form, and not for an aggregate sum: *Steele v. Holladay*, 20 Or. 462.

Attorney's fees for services rendered to former executor for the estate are a charge against estate: *In re Marvin*, Myr. Prob. 163.

Traveling expenses connected with the administration of foreign assets should be allowed out of those assets, and not out of the assets collected in this state: *In re Ortiz*, 86 Cal. 306.

Administrator should be allowed the amount paid to the appraisers, and all necessary traveling expenses when on the business of the estate. An item of traveling expenses should not be rejected *in toto* because the account does not disclose for what the expense was incurred, but it should be retired from the list of items, with leave to bring it forward with proper proofs in a future account. The administrator should also be allowed for the services and traveling expenses of his attorney, not exceeding a reasonable compensation for the labor actually performed, when the same are necessary to properly perform the

duties of his trust, and are incurred in good faith, in litigation carried on under the advice of counsel, or for services in the settlement of the estate; but should not be allowed for counsel fees or expenses incurred in a matter with which he, as administrator, had nothing to do, such as procuring the removal of a guardian of minor heirs: *In re Rose*, 80 Cal. 166.

If administrator has advanced moneys for the benefit of the estate of minor heirs, he may be allowed credit therefor on account of their distributive shares upon final settlement, but cannot charge such advances as expenses of administration: *In re Rose*, 80 Cal. 166.

An executor may employ counsel to attend to the litigation concerning an estate, but he has no right to employ him at the expense of the estate to keep the accounts and do that business for which the administrator is compensated by his fee: *Lucich v. Medin*, 3 Nev. 93.

Attorney's fees may or may not be expenses of administration, according to the circumstances of each case: *In re Nicholson*, 1 Nev. 518.

If money is advanced by an administrator for the benefit of an estate, and to avoid litigation, which resulted beneficially to the estate, and without gain to the administrator, he may maintain an action against the estate for the amount advanced: *Furth v. Wyatt*, 17 Nev. 180.

§ 251. [1617.] Not to Purchase Claims against the Estate.—No administrator or executor shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

Arizona.—Same. Rev. Stats., sec. 1211.

Idaho.—Same. Rev. Stats., sec. 5585.

Montana.—Same. Comp. Stats., p. 338, sec. 252.

Nevada.—Same. Gen. Stats., sec. 2889.

Oregon.—Same. Hill's Laws, sec. 1177.

Utah.—Same. Comp. Laws, sec. 4224.

Washington.—Same. Code Proc., sec. 1055.

Wyoming.—Same. Laws 1890-91, p. 288, sec. 6.

An administrator purchasing a claim for less than is due is entitled to receive from the estate only the amount which he paid for the claim: *Furth v. Wyatt*, 17 Nev. 180.

§ 252. [1618.] **Commissions.**— When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent; for all above that sum and not exceeding ten thousand dollars, at the rate of five per cent; for all above ten thousand dollars and not exceeding twenty thousand dollars, at the rate of four per cent; for all above twenty thousand dollars and not exceeding fifty thousand dollars, at the rate of three per cent; for all above fifty thousand dollars and not exceeding one hundred thousand dollars, at the rate of two per cent; and for all above one hundred thousand dollars, at the rate of one per cent. The same commission shall be allowed to administrators. In all cases, such further allowance may be made as the court may deem just and reasonable for any extraordinary service, but the total amount of such extra allowance must not exceed one half the amount of commissions allowed by this section. Where the property of the estate is distributed in kind, and involves no labor beyond the custody and distribution of the same, the commissions shall be computed on all the estate above the value of twenty thousand dollars at one half the rates fixed in this section. Public administrators shall receive the same compensation and allowances as are allowed in this title to other administrators. All contracts between an executor or administrator and an heir, devisee, or legatee, for a higher compensation than that allowed by this section, shall be void; *provided*, this act shall not apply to estates now in course of administration, except where and to the extent that such estates consist of bonds and other securities to be distributed without extra expense in administration.

Arizona. — The same, to the phrase “for all above ten thousand dollars”; then as follows: “For all above that sum, at the rate of four per cent; and the same commission must be allowed administrators. In all cases, such further allowance may be made as the probate judge may deem just and reasonable, for any extraordinary service. The total amount of such allowance must not exceed the amount of commissions allowed by this section; and that public administrators shall receive the same compensation and allowances as are allowed in this title to other administrators.” Rev. Stats., sec. 1212.

Idaho. — Same as Arizona, except that the clause in relation to public administrators is omitted. Rev. Stats., sec. 5586.

Montana. — "When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commission on all sums of money only actually received by him from the sale of property of the estate, or actually disbursed by him in the settlement of the estate as follows: For the first one thousand dollars, at the rate of seven per cent; for all above that sum, at the rate of four per cent; and the same commission must be allowed public administrators and other administrators, which shall be the commission herein provided for. In all cases, such further allowance may be made as the probate judge may deem just and reasonable for any extraordinary services; the total amount of such services must not exceed the total amount of the commission allowed by this section." Laws 1887 (extra session), p. 59, sec. 1, amending Comp. Laws, p. 338, sec. 253.

Nevada. — Same as Arizona, except that the provision relating to public administrators is omitted. Gen. Stats., sec. 2890.

Oregon. — "The compensation provided by law for an executor or administrator is a commission upon the whole estate accounted for by him, as follows: 1. For the first thousand dollars, or any less sum, at the rate of seven per centum thereof; 2. For all above that sum and not exceeding two thousand dollars, at the rate of five per centum thereof; 3. For all above two thousand dollars and not exceeding four thousand dollars, at the rate of four per centum thereof; 4. For all above the last-mentioned sum, at the rate of two per centum thereof. In all cases, such further compensation as is just and reasonable may be allowed by the court, or judge thereof, for any extraordinary and unusual services, not ordinarily required of an executor or administrator in the discharge of his trust." Hill's Laws, sec. 1180.

Utah. — Same, except that the clause relating to public administrators is omitted. Comp. Laws, sec. 4225.

Washington. — Same to the phrase "for all above that sum"; then as follows: "For all above that sum and not exceeding two thousand dollars, at the rate of five per cent; for all above that sum, at the rate of four per cent; and the same commission shall be allowed to administrators." The balance of the section contains the same provision as Arizona in relation to "further allowance." Code Proc., secs. 1056.

Wyoming. — Same as California, except that instead of "seven," "ten" is inserted; instead of "five," "seven" is inserted; instead of "four," "five" is inserted; and the clause concerning the public administrator is omitted. Laws 1890-91, pp. 288, 289, sec. 7.

Laws regulating fees of administrators are not contracts that the same compensation will continue during the term of any incumbent, nor does the incumbency of such office create a vested right to receive for future service the fees established at the time of his appointment: *In re Dewar*, 10 Mont. 426.

Administrator is not entitled to be credited with his commissions until the settlement of his final account: *In re Rose*, 80 Cal. 166.

Fees of administrator is an inchoate right until allowed upon final accounting, and is regulated by the law in force at the time of the accounting, and not by the law at the time of his appointment, unless the claim for such fees had become a vested right by reason of the services being fully performed prior to the passage of the latter law, and the fact appears in the account: *In re Dewar*, 10 Mont. 426.

No commissions can be allowed an executor or administrator on prop-

erty which never came into his possession, nor on property of the estate upon which he did not administer, and which is not under control of the court of probate: *Steele v. Holladay*, 20 Or. 462.

Unusual and extraordinary services are such as are not usually required of an executor in the discharge of the duties of his trust: *Steele v. Holladay*, 20 Or. 462.

Claim for unusual and extraordinary services of executor should contain a statement of each special service claimed to have been rendered, with its particular value, and no allowance should be made therefor until such an account is rendered: *Steele v. Holladay*, 20 Or. 462.

When the administration is complete and the estate finally settled, executors and administrators are entitled to compensation upon the whole value of the estate at the established rates: *Ord v. Little*, 3 Cal. 287; *In re Simmons*, 43 Cal. 543; *In re Isaacs*, 30 Cal. 113; *In re Miner*, 46 Cal. 572; *In re Marvin*, Myr. Prob. 163.

Where the administrator resigns or is removed, there is no fixed rule of compensation. The court should apportion it according to sound judgment, having in view the total compensation fixed by law: *Ord v. Little*, 3 Cal. 287.

An administrator being compelled by law to hold, protect, and guard funds of the estate coming into his hands, which he has reason to believe to be assets of the estate, until the right to the funds can be determined, he is entitled to commissions thereon: *Wells, Fargo & Co. v. Robinson*, 13 Cal. 133.

Executors are not entitled to commissions upon land of which deceased died seised and possessed, and which was inventoried and taken into the possession of such executors, but was taken from them by the final judgment in a suit which was pending at the time decedent died, and which they afterwards defended: *In re Ricard*, 70 Cal. 69.

The court should not allow an administrator fees or commissions for property which does not come into his hands, but which is in the possession

of other parties, who claim title to it adversely to the estate, even though it is appraised and included in the inventory: *In re Simmons*, 43 Cal. 543.

Administrator should be allowed commissions only on the net proceeds of partition sales coming to estate: *In re Marvin*, Myr. Prob. 163.

Executor cannot charge commissions on value of homestead: *In re Reck*, Myr. Prob. 59.

Extra compensation allowed to administrator when: *In re Beideman*, Myr. Prob. 66.

A co-executor who renders no service to the estate is entitled to no compensation: *Hope v. Jones*, 24 Cal. 89.

Co-executors are to be compensated according to the service rendered by each by an equitable division of the whole commission: *In re Barton*, 55 Cal. 87.

A person acting as executor under void letters is not entitled to commissions, fees, or charges: *In re Frey*, 52 Cal. 661.

An administrator may renounce his claim to compensation. A promise made by him to the person entitled to be appointed administrator of the estate, before his appointment, that he would not charge for his services, is equivalent to a renunciation of his claim: *In re Davis*, 65 Cal. 309.

The fees of an administrator is an expense of administration, and should be allowed in preference even to funeral expenses: *In re Nicholson*, 1 Nev. 518.

When the divorced husband makes testamentary disposition of his own interest in the property held in common with his divorced wife, and managed by him, and appoints his executors as trustees to manage and control the property devised, and the trustees continue to manage the entire property held in common, and to make monthly payments to the divorced wife, the trustees have no control over her interest by virtue of any power under the will, and are entitled to no compensation, commissions, or fees, under the will, for their management and care of such interest: *Blanckenburg v. Jordan*, 86 Cal. 171.

Form No. 176.—Renunciation of Compensation by Executor.

[Title of Court and Estate.]

Whereas the undersigned has been duly appointed executor of the last will and testament of —, deceased, and provision is made therein for compensation for my services as such executor; and whereas I have elected to receive in lieu thereof the commissions allowed by law for such services, —

Now, therefore, I do hereby renounce all claim for the compensation provided in said will.

Dated —, 18—.

ARTICLE II.**ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.**

- § 253. To render an exhibit.
- § 254. Citation to account.
- § 255. Petition for citation to render account.
- § 256. Citation to account on application.
- § 257. Objections to account, who may file.
- § 258. Attachment for not obeying citation.
- § 259. To render accounts.
- § 260. Executor to account after his authority revoked.
- § 261. Revoking authority of executor when.
- § 262. To produce and file vouchers which remain in court.
- § 263. Vouchers for items less than twenty dollars.
- § 264. Day of settlement and notice.
- § 265. Final settlement, partition, and distribution.
- § 266. Interested party may file exceptions to account.
- § 267. All matters may be contested by the heirs.
- § 268. Settlement of accounts conclusive when.
- § 269. Proof of notice of settlement of accounts.
- § 270. Sale of personal property.
- § 271. Funds pending settlement.

§ 253. [1622.] To Render an Exhibit. — Six months after his appointment, and at any time when required by the court, either upon its own motion or upon the application of any person interested in the estate, the executor or administrator must render, for the information of the court, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs.

Arizona. — “At the third term of the court” substituted for “six months”; otherwise same. Rev. Stats., sec. 1213.

Idaho. — Same as Arizona. Rev. Stats., sec. 5587.

Montana. — Same as Arizona. Comp. Stats., p. 338, sec. 254.

Nevada. — Same as Arizona. Gen. Stats., sec. 2891.

Oregon. — “An executor or administrator shall, within six months from the date of the notice of his appointment, and every six months thereafter until the administration is completed and he is discharged from his trust, render an account, verified by his own oath, and file the same with the clerk, showing the amount of money received and expended by him, from whom received and to whom paid, with the proper voucher for such payments, the amount of the claims presented against the estate and allowed or disallowed, and the name of the claimants of each, and any other matter necessary to show the conditions of the affairs thereof.” Hill’s Laws, sec. 1170.

Utah. — Same as California. Comp. Laws, sec. 4226.

Washington. — Same as California. Code Proc., sec. 1057.

See §§ 244–247, *ante*, and notes.

A claim which has been duly approved and filed is ranked among the acknowledged debts of the estate, to be paid in due course of administration, and thereafter, in event of a contest, the burden of proof as to such claim is upon the contestant: *In re Loshe*, 62 Cal. 415.

If executors exercise their best judgment in employing an agent abroad to receive money of the estate and forward it to them, and employ a person who is well recommended to them, they are not chargeable with money lost by reason of the insolvency of the agent: *In re Taylor*, 52 Cal. 477.

An administrator is not chargeable with interest agreed to be paid on a loan improperly made by him, unless he has collected or could collect such interest: *In re Moore*, 72 Cal. 335.

An administrator should be charged with interest, when for no good reason he delays filing his account: *In re Seligman*, Myr. Prob. 8.

An executor who loans money under the direction of the will, and becomes chargeable with it by reason of not taking sufficient security, if he acted in good faith, is not to be charged with interest thereon, unless it appears that he could have loaned the money to others upon good security, by using ordinary diligence. The advice of his attorney cannot shield him from responsibility, if the loan was made on land already encumbered, and no ex-

amination of the records was made, and no abstract was furnished to the attorney upon which his opinion could be based. The estate, however, cannot be charged by the executor with the expenses of foreclosing such mortgage: *In re Holbert*, 48 Cal. 627.

If an administrator of an estate, holding a junior mortgage, the property of the estate, advances money to pay off a senior mortgage so as to let in the junior mortgage, and a loss thereby ensues, the court cannot allow him in his account for any portion of the loss thus sustained by the advancement so made: *Tompkins v. Weeks*, 26 Cal. 50.

If an administrator forecloses a mortgage given to his intestate upon land upon which there is a prior mortgage, and at the foreclosure sale becomes the purchaser for a sum too small to satisfy the costs and both mortgages, he should not be charged in his account with the amount of the mortgage debt and stipulated interest, but should be charged with the amount of his bid, less the sum paid by him for costs, and in satisfaction of the former mortgage and with legal interest thereon: *In re Miner*, 46 Cal. 571.

If the intestate in his lifetime had contracted for the services of another for one year, at stipulated wages per month, and died soon after, and the employee continued to perform the services for the year with the assent of

the administrator, and his services were necessary for the protection of the estate, the administrator should be allowed the wages paid him in the settlement of his account: *In re Miner*, 46 Cal. 564.

If the administrator of a deceased partner intermeddles with partnership affairs, and advances money or uses funds of the estate to carry on business with the surviving partner, and loss thereby ensues, it is his loss, and he cannot be allowed to charge it against the estate in his account: *Tompkins v. Weeks*, 26 Cal. 50.

An administrator should not be allowed in his accounts for expenditures made in building an addition to a hotel belonging to the estate, or in purchasing adjoining property. The allowance of traveling expenses of the administrator's attorney, or of the salary of a book-keeper will not necessarily be considered as error: *In re Moore*, 72 Cal. 335.

Executors are not entitled in their account for money paid by them in excess of legal interest, when there was no written promise by the testator to pay the same: *In re Dunne*, 58 Cal. 543.

If an executor delays to take steps for the collection of a debt until after the same is outlawed, and the delay is not in consequence of any mistake of law, or of advice of counsel, he will be liable to the estate for the loss occasioned by his negligence: *In re Sanderson*, 74 Cal. 199.

An administrator cannot be charged with the rental value of land of the estate after it has been sold by the sheriff under a decree of foreclosure. From that time the purchaser at the sale is entitled to the rents and profits: *Walls v. Walker*, 37 Cal. 424.

The widow should be charged with rent of homestead, when it appears that the property exceeds in value five thousand dollars; such charge to be in proportion to such excess: *In re Titcomb*, Myr. Prob. 55.

Sums paid as rent under an agreement of the testator to pay the same should be allowed to an executor or administrator in his account: *In re Dunne*, 58 Cal. 543.

Executors and administrators are entitled to be allowed in their ac-

counts for costs incurred by them in actions prosecuted or resisted by them, unless it appears that they entered into litigation without just cause: *Hicox v. Graham*, 6 Cal. 169; *In re Miner*, 46 Cal. 572.

It is no part of the duty of an administrator to contest the probate of a will, and the fees paid an attorney at law for services rendered in such contest is not a proper charge against the estate: *In re Parsons*, 65 Cal. 240.

An executor cannot litigate the claim of one legatee as against another at the expense of the estate: *Roach v. Coffey*, 73 Cal. 281; *In re Wright*, 49 Cal. 550; *In re Marrey*, 65 Cal. 287; *Bates v. Ryberg*, 40 Cal. 465.

If, by the terms of a will, the executor is directed to keep invested the money of the estate in first-class real estate security, and the executor loans said money upon real estate security which is not good, he cannot, in his account, charge the estate with the expenses of litigation, attorney's fees, etc.; nor can such items be allowed to the executor in the settlement of his accounts: *In re Holbert*, 48 Cal. 627.

The employment of an attorney for the mere purpose of procuring letters of administration is a contract made in advance of any authority on the part of the client to deal with the assets of the estate in any wise. His application may not be successful, and in that case it would hardly be pretended that the estate is to be bound for the attorney's fees. Where a *bona fide* contest as to the right to administer has arisen and been determined, in which the employment of counsel was necessary, it may be in the discretion of the court to allow the necessary expenses of all the parties concerned, including a reasonable counsel fee; but this has no reference to the mere ordinary proceedings to obtain letters of administration, in which no such circumstances appear, and whether the application be successful or not, the estate is not to be charged with the fees of the attorney for the applicant: *In re Simmons*, 43 Cal. 548.

If the court appoints an administrator, but the order is afterwards reversed on appeal the adminis-

trator is not entitled to an allowance for attorney's fees, and costs expended by him in the contest, and it is a mooted question whether the successful party is entitled to such an allowance: *In re Barton*, 55 Cal. 87.

After letters are granted, the administrator may, and it is ordinarily his duty, to employ competent counsel to aid him in the management of adversary suits, in which the estate may be involved while under his care, and fees for such services may be allowed from the assets of the estate: *In re Simmons*, 43 Cal. 543; *In re Miner*, 46 Cal. 565.

A ruling of a court in fixing the amount of compensation to be allowed an administrator in payment of counsel, in the settlement of an estate, will not be disturbed, unless there is a plain abuse of discretion: *In re Gasq*, 42 Cal. 289.

An administrator acting in good faith is entitled to the aid of counsel in all litigation touching the estate, and to be allowed the reasonable compensation paid such counsel by the court in his account: *In re Miner*, 46 Cal. 565.

If the executors settle a claim against the estate of their decedent by a novation, giving their own notes and that of another to the claimant, it is a payment of the said claim, and they are entitled to be credited therewith: *In re Dunne*, 58 Cal. 543.

A person indebted to a decedent, and who is appointed special administrator of his estate, is, upon settlement of his account as such special administrator, properly charged by the probate court with the amount of the indebtedness: *In re Armstrong*, 69 Cal. 239.

In the settlement of an administrator's annual account, he should be charged with the amount of his own note to the deceased, if there is one, and the interest therein stipulated to be paid: *In re Mner*, 46 Cal. 564.

An administrator cannot set off his commissions on the settlement of his annual account against a sum due by him to the intestate: *In re Miner*, 46 Cal. 564.

Services rendered and money advanced, at the request of an administrator, for the benefit of an estate,

are "expenses of administration," and the probate court has exclusive original jurisdiction to enforce and adjust such demands: *Gurnee v. Maloney*, 38 Cal. 85.

In settling the account of an administrator, the court may adjudicate upon certain items, such as clerk's fees, in anticipation of payment: *In re Parsons*, 65 Cal. 240.

Items not found in the account of an administrator, nor in the report accompanying the same, cannot be settled by the court: *In re Parsons*, 65 Cal. 240.

In an order settling the administrator's account, the court adjudged that all the items allowed and not paid were a lien and charge upon the property of the estate; it was held that the order could produce no injury to any one: *In re Parsons*, 65 Cal. 240.

If, in an annual account, certain charges are rejected, because the proper vouchers are not produced, the administrator may include these items in a subsequent account, and, by producing vouchers, have them allowed: *Walls v. Walker*, 37 Cal. 424.

Where an administrator's account, as presented, is not sufficiently specific, the superior court, sitting as a court of probate, may require the administrator to make the account more specific; and if, pending the settlement of such account, the administrator presents a second account, the court may order him to combine such accounts, and to present one account of his administration, which shall be full and complete up to the time of its rendition: *Hirshfeldt v. Cross*, 67 Cal. 661.

Under our system, the probate court (superior court now. — ED.) has jurisdiction to settle the accounts of an administrator, and to ascertain and determine the amount of his liability to the estate, and its decree settling the accounts and fixing the amount of liability is conclusive: *Reynolds v. Brumagin*, 54 Cal. 254; *Grady v. Porter*, 53 Cal. 685. See also § 268, *post*, and notes.

A probate court has the power, in the settlement of an executor's account, to allow or disallow any items in the account, even though there is no contest; and where it is brought to

the knowledge of the court that the executor has failed to charge himself with money or property belonging to the estate, it is the duty of the court to examine the matter, of its own motion: *In re Sanderson*, 74 Cal. 199.

When an executrix dies without having rendered to the probate court any account, report, or exhibit of the estate, or of its management by her, a court of equity alone has power to adjust her accounts with the estate of which she was executrix; and when the executrix is also an heir, a settlement of her accounts is a prerequisite to a distribution of the estate: *Curtis v. Curtiss*, 65 Cal. 572.

Courts of equity have jurisdiction to adjust the account of an administrator who dies without rendering one to the estate, and such adjustment is a prerequisite to an action against his sureties: *Chaquette v. Ortel*, 60 Cal. 594; *Bush v. Lindsey*, 44 Cal. 121.

The judgment of a court of equity settling an account of an administrator who has died without doing so himself, does not come within the provisions of section 1504 of the Code of Civil Procedure, requiring a copy of the judgment to be filed among the papers of the estate, but so far as the enforcement of the payment it directs is concerned, it is to be regarded as a decree of the probate court settling the account and directing payment, and the failure of the administrator to pay as directed by the judgment is a breach of his bond for which the bondsmen are liable: *Chaquette v. Ortel*, 60 Cal. 594.

Upon the settlement of an administrator's account, where it appeared that the administrator had paid to the widow only a small portion of the monthly allowance made by the probate court for the support of the family pending the administration, on the plea that she had abandoned the children, testimony offered on her part of her readiness and willingness to take care of the children, and that she was forcibly excluded from the family residence by the administrator, should be admitted: *In re Moore*, 72 Cal. 359.

In the settlement of an administrator's account, evidence is admissible to show that he unnecessarily pro-

longed the administration of the estate: *In re Moore*, 72 Cal. 359.

The statute of limitations does not run in favor of the executor against the heirs for an accounting: *In re Sanderson*, 74 Cal. 199.

On a final accounting, a simple receipt produced, together with oral evidence of the items making up the amount, is not sufficient to authorize a court to allow such items against the estate: *In re Herteman*, 73 Cal. 545.

On a final accounting, insufficient proof of mistake in former account, what is: *In re Herteman*, 73 Cal. 545.

Matters not directly adjudicated is not an estoppel to interested parties: *In re Haskell*, Myr. Prob. 204.

The account cannot be settled until there is an appraisement in the inventory on file: *In re Selda*, Myr. Prob. 233.

The probate court has exclusive jurisdiction to hear and determine whether the items of expenses of administration were properly incurred or not: *Dodson v. Nevitt*, 5 Mont. 518.

Debts created by an executor for the benefit of an estate are expenses of administration: *Dodson v. Nevitt*, 5 Mont. 518.

Expenses incurred in a controversy between executors, one opposing the qualification of the others, are not proper charges against the estate: *In re Millenovich*, 5 Nev. 161.

The expenses of last illness which have been allowed and paid, though apparently extravagant, but are no more than the usual charges for like services, an order approving the account of them will be affirmed on appeal: *In re Millenovich*, 5 Nev. 161.

Funeral expenses should be allowed if they have been incurred with ordinary prudence, and with regard to the condition in life of deceased: *In re Millenovich*, 5 Nev. 161.

The fees of an administrator is an expense of administration, and should be allowed in preference even to funeral expenses: *In re Nicholson*, 1 Nev. 518.

Insurance paid on property of the estate is an expense of administration unless it is paid under circumstances showing recklessness and want of proper care and prudence: *In re Nicholson*, 1 Nev. 518.

Interest on money borrowed by an executor or administrator should not be allowed, because he has no authority to borrow money for the use of the estate: *In re Millenovich*, 5 Nev. 161.

An executor may pay money to compromise a suit pending against an estate. But he cannot lawfully make such payment without the previous consent of the probate court: *Lucich v. Medin*, 3 Nev. 93.

It is within the jurisdiction of the probate court to order payment of assessments legally levied upon mining stocks belonging to the estate of a deceased person; and if the executor act in obedience to such order, it would be inequitable to charge him personally with payments so made, or refuse to allow them as just payments made for the estate: *In re Millenovich*, 5 Nev. 161.

The fact that part of an illegal claim against an estate has been paid

and allowed in a previous account of the executor is no reason why the balance should be allowed on a subsequent account: *In re Millenovich*, 5 Nev. 161.

An administrator who has paid out money under an order of court is protected by it, although the order has been lost from the files, and has not been recorded, by reason of the carelessness of the clerk, and proof of such order may be made *dehors* the record: *In re Millenovich*, 5 Nev. 161.

That the appraisers of an estate were not disinterested parties, as by statute they are required to be, is no reason why the just accounts of the executor should not be settled and allowed: *In re Millenovich*, 5 Nev. 161.

A proper accounting by an administrator in Oregon relieves him from an action by an administrator in Washington to recover the estate accounted for: *McCoy v. Ayers*, 2 Wash. Ter. 207.

Form No. 177.—Exhibit.

[Title of Court and Estate.]

In accordance with the provisions of the law, —, the administrator of the estate of —, deceased, renders the following exhibit for the information of the court:—

—, administrator of the estate of —, deceased, in account with said estate.

18—.

Jan. 1.	To cash received from Sacramento Savings Bank, being money deposited there by deceased in his lifetime.....	\$—
Feb. 3.	To cash in possession of deceased at the time of his death.....	—
	To net amount of sales of personalty, as shown by the return of sale on file herein.	—
	To net proceeds of sales of realty, as shown by the return of sale on file herein.....	—
	Total.....	\$—

Contra.

Jan. 17. Fees of clerk of this court.....\$ —

Jan. 19.	Fee of attorney for administrator.....	\$—
etc.	etc.....	—
	Total.....	\$—
	Balance in the hands of administrator.....	\$—

Claims against said estate which have been allowed:—

Name of claimant.	Nature of claims.	Amounts.
J. F. Clark.	Funeral expenses.	\$150.00
etc.	etc.	etc.

Claims against said estate which have been presented and not yet allowed:—

Name of claimant.	Nature of claims.	Amounts.
C. Feldhusen.	Groceries.	\$75.00
etc.	etc.	etc.

(State all other matters necessary to show the condition of affairs.)

—, Administrator of the Estate of —, Deceased.

—, Attorney for Administrator.

(Verification as in Form No. 99, § 143, *ante*.)

§ 254. [1623.] **Citation to Account.** — If the executor or administrator fails to render an exhibit for six months after his appointment, the court, or a judge thereof, must cause a citation to be issued requiring him to appear and render it.

Arizona. — Same. Rev. Stats., sec. 1214.

Idaho. — Same. Rev. Stats., sec. 5588.

Montana. — Same. Comp. Stats., p. 338, sec. 255.

Nevada. — Same. Gen. Stats., sec. 2892.

Oregon. — “An executor or administrator who shall fail to file an account as required in the last section may be required by a citation, ordered by the court or judge, to appear and do so, either upon the application of an heir or creditor, or other person interested in the estate, or without it.” Hill’s Laws, sec. 1171.

Utah. — Same as California. Comp. Laws, sec. 4227.

Washington. — Same as California. Code Proc., sec. 1058.

Wyoming. — Same as California. Laws 1890–91, p. 289, sec. 8.

§ 255. [1624.] **Petition for Citation to Render Account.** — Any persons interested in the estate may, at any time before the final settlement of accounts, present his petition to the court, or a judge thereof, praying that the executor or administrator be required to appear and render such exhibit.

setting forth the facts showing that it is necessary and proper that such an exhibit should be made.

Arizona. — Same. Rev. Stats., sec. 1215.

Idaho. — Same. Rev. Stats., sec. 5589.

Montana. — Same. Comp. Stats., p. 338, sec. 256.

Nevada. — Same. Gen. Stats., sec. 2893.

Utah. — Same. Comp. Laws, sec. 4228.

Washington. — Same. Code Proc., sec. 1059.

Wyoming. — Same, except that the words "after one year and" are inserted after the word "may," and after the word "judge," the words "or a commissioner thereof" are inserted. Laws 1890-91, p. 289, sec. 9.

Form No. 178. — Petition that Administrator Render an Exhibit.

[Caption, Form No. 1, § 5, *ante*.]

1. That — was duly appointed administrator of the above-named estate on the — day of —, A. D. 18—, and immediately qualified as such, and entered upon the duties of his trust;

2. That more than six months have elapsed since said appointment was made, but said administrator has not rendered to this court any exhibit under oath showing the amount of money received or expended by him, the amount of all claims presented against the estate or the names of the claimants, or any other matters necessary to show the condition of the affairs of said estate;

3. That petitioner is a creditor of said estate in the sum of \$—, and his claim therefor has been duly presented, allowed, approved, and filed in this court, and is ranked among the acknowledged debts of said estate to be paid in due course of administration;

4. That said administrator, though often requested by petitioner to do so, will give no information as to the condition of said estate, nor its means of paying its debts, including the claim of petitioner;—

Wherefore petitioner prays that said administrator be required to render an exhibit, such as is required by law to be made by him six months after his appointment.

—, Attorney for Petitioner.

—, Petitioner.

§ 256. [1625.] Citation to Account on Application. — If the court, or a judge thereof, is satisfied, either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must direct a citation to be issued to the executor or administrator, requiring him to appear, at some day to be named in the citation, and render an exhibit as prayed for.

Arizona. — Same. Rev. Stats., sec. 1216.

Idaho. — Same. Rev. Stats., sec. 5590.

Montana. — Same. Comp. Stats., p. 338, sec. 257.

Nevada. — Same. Rev. Stats., sec. 2894.

Utah. — Same. Comp. Laws, sec. 4229.

Washington. — Same, except that the words "or a judge thereof" are omitted. Code Proc., sec. 1060.

Wyoming. — Same as California. Laws 1890-91, p. 289, sec. 10.

Form No. 179. — Order for Citation to Administrator to Render an Exhibit.

[Title of Court and Estate.]

On reading and filing the petition of —, a person interested in the estate of —, deceased, and the court being satisfied from the testimony of —, a witness produced and sworn in that behalf, that the facts alleged in said petition are true, and it appearing therefrom that the administrator of said estate has and does fail to render an exhibit as required by law for the information of the court, showing the amount of money received and expended by him, the amount of all claims presented against said estate, the names of the claimants, etc,—

It is ordered that a citation be issued herein to —, the administrator of said estate, requiring him to appear before this court, at the court-room thereof, on the — day of —, A. D. 18—, at the hour of — o'clock, — M., of said day, and render such exhibit.
—, Judge of the — Court.

Dated —, 18—.

§ 257. [1626.] Objections to Account, Who may File. — When an exhibit is rendered by an executor or administrator, any person interested may appear, and, by objections

in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled, or mismanaged the estate, his letters must be revoked.

Arizona. — Same. Rev. Stats., sec. 1217.

Idaho. — Same. Rev. Stats., sec. 5591.

Montana. — Same. Comp. Stats., p. 339, sec. 258.

Nevada. — Same. Gen. Stats., sec. 2895.

Utah. — Same. Comp. Laws, sec. 4230

Washington. — Same. Code Proc., sec. 1061.

Wyoming. — Same, except that "or commissioner" is inserted before "may examine." Laws 1890-91, p. 289, sec. 11.

Objections to Exhibit: See form No. 188, § 266, *post*.

§ 258. [1627.] Attachment for not Obeying Citation. — If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him, and such exhibit enforced, or his letters may be revoked, in the discretion of the court.

Arizona. — Same. Rev. Stats., sec. 1218.

Idaho. — Same. Rev. Stats., sec. 5592.

Montana. — Same. Comp. Stats., p. 339, sec. 259.

Nevada. — Same. Gen. Stats., sec. 2896.

Utah. — Same. Comp. Laws, sec. 4231.

Washington. — Same. Code Proc., sec. 1062.

Wyoming. — Same. Laws 1890-91, p. 289, sec. 12.

See *In re Walsh*, Myr. Prob. 251.

§ 259. [1628.] To Render Accounts. — Within thirty days after the expiration of the time mentioned in the notice to creditors within which claims must be exhibited, every executor or administrator must render a full account and report of his administration. If he fails to present his account, the court or judge must compel the rendering of the account by attachment, and any person interested in the estate may apply for and obtain an attachment; but no attachment must issue unless a citation has been first issued, served, and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account

must exhibit all debts which have been presented and allowed during the period embraced in the account.

Arizona. — Same. Gen. Stats., sec. 1219.

"That every executor and every administrator of every estate, and every guardian of every infant and of every estate, and the conservator of every incompetent person, shall, in addition to the duties now required by law, annually make and file with the probate court an accounting of all his or her acts and doings in said estate since his or her last report, duly verified, filing therewith all his vouchers and exhibits." Laws 1891, p. 44, sec. 1.

"If any executor, administrator, guardian, or conservator fails to make such accounting as aforesaid, he or she shall be cited by the probate court to forthwith appear and make such accounting, and upon his or her failure so to do, shall be discharged upon an order made by the probate court, and entered upon the records of such probate court, and the said probate court shall by an order entered upon the records of said probate court appoint another person in his or her place and stead, requiring him or her to give suitable bonds for the faithful performance of his or her duties under the probate laws of the territory, said bonds to be approved by the said probate court; and he or she so discharged shall immediately turn over to his or her successor all property and assets, and all choses in action, and all papers, vouchers, and documents of every kind whatsoever, and his or her failure so to do shall make him and her, or his or her sureties, liable therefor, and he or she shall be compelled to account to the court of all matters of his or her administration." Laws 1891, p. 44, sec. 2.

"All acts and parts of acts inconsistent herewith are hereby repealed." Laws 1891, p. 44, sec. 3.

Idaho. — Same. Rev. Stats., sec. 5593.

Montana. — Same, except as to time, which is "one year from the time of his appointment." Comp. Stats., p. 339, sec. 260.

Nevada. — Same as Montana. Gen. Stats., sec. 2827.

Oregon. — "When the estate is fully administered, it shall be the duty of the executor or administrator to file his final account. Such account shall be verified by his own oath, and contain a detailed statement of the amount of money received and expended by him, from whom received, and to whom paid, and refer to the vouchers for such payments, and the amount of money and property, if any, remaining unexpended or appropriated." Hill's Laws, sec. 1173.

"An executor or administrator who shall fail to file his final account as provided in section 1173 may be proceeded against in like manner and with like effect as provided in section 1171, in case of failure to file a semi-annual account." Hill's Laws, sec. 1181.

Utah. — Same as California. Comp. Laws, sec. 4232.

Washington. — Last sentence omitted; otherwise same as Montana. Code Proc., sec. 1063.

"If any executor or administrator fail to make either annual or final settlement as required by law, and do not show good cause for such failure after

having been cited for that purpose, the court shall order such executor or administrator to make such settlement, and may enforce obedience to such order by attachment, and may revoke his letters." Code Proc., sec. 944.

"If any person who has surrendered his letters testamentary or of administration, or whose letters have been revoked, or the legal representatives of any deceased executor or administrator, shall fail to make final settlement as required by law, after being cited for that purpose by the court, it shall order such delinquent to make such settlement, and may enforce obedience to such order by attachment." Code Proc., sec. 945.

"In all cases where citations or attachments may be issued against any executor, administrator, or other person for failing to settle his accounts, such delinquent shall pay all costs incurred thereby, the collection of which costs may be enforced by attachment." Code Proc., sec. 946.

Wyoming. — Same as California. Laws 1890-91, p. 289, sec. 13.

Judge may Receive Accounts at Chambers: Cal. Code Civ. Proc., sec. 166; also § 1, *ante*.

It is the duty of every executor or administrator, within six months after notice of his appointment, and every six months thereafter until the estate is settled, to file a semi-annual account; and the county court must, at the first term after any such account is filed, ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed within the first six months, or any succeeding six months thereafter, after paying the funeral charges and expenses of administration, and if so, it shall order and direct; but if estate be insufficient for that purpose, it shall ascertain what per centum it is sufficient to satisfy, and direct accordingly: *Roster v. Morat*, 19 Or. 181.

When it is not charged that any of the property or assets of the petitioner's testator came into the possession or control of an administrator of an administrator of such testator, such administrator cannot be called upon to file an account in the estate of such testator: *Cross v. Basket*, 17 Or. 84.

An executor who, upon departing from the state for an indefinite period, left the money and business of the estate in the care of his co-executor, and thereafter took no part in its management, but joined in a final account, with the co-executor long after the time allowed by statute for the filing of the account, is liable, upon the insolvency of the co-executor, for

the funds appropriated by him to his own use: *In re Osborn*, 87 Cal. 1.

It is the duty of executors to account within reasonable or statutory time, and a neglect to account which results in waste renders the executors jointly and severally liable, the same as in case of failure to collect debts before the statute of limitations has run against them: *In re Osborn*, 87 Cal. 1.

Time of filing account provided by law is merely directory, and a failure to file an account is not ground for revoking letters: *In re Stow*, Myr. Prob. 97.

Each executor may present a separate account for final settlement: *Hope v. Jones*, 24 Cal. 92.

The probate court has no authority to cite an administrator of an administrator to settle the account of his intestate with the estate of which he was administrator: *Bush v. Lindsey*, 44 Cal. 121.

An order directing an administrator to dismiss a suit brought by him on a claim alleged to be due the estate, and finding that thereupon there is no property in the hands of the administrator, and directing that he forthwith file his final account, is an attempt on the part of the court making it to state and settle the account of the administrator, and is erroneous: *In re Bullock*, 75 Cal. 419.

Form No. 180.—Account and Report.

[Title of Court and Estate.]

—, administrator of the estate of —, deceased, in account
with said estate.

DATE.	NAME OF CLAIMANT AND NATURE OF CLAIM.	VOUCHER.	AMOUNT.
1891.	<i>Dr.</i>		
Aug. 10.	To amount of inventory and appraisement of the property of said estate on file herein		\$10,000 00
Aug. 16.	Rent received from T. Jackson, tenant of house No. 599 Sansome Street, San Francisco		100 00
Aug. 20.	Interest received from G. Jefferson, on his note to deceased, dated June 12, 1891		50 00
			<u>\$10,150 00</u>
1891.	<i>Contra.</i>		
Aug. 1.	—, Clerk's fees	1	\$10 00
Aug. 10.	—, Advertising notice to creditors	2	5 00
Sept. 7.	—, Medical attendance on deceased during his last illness	3	300 00
Oct. 1.	—, widow of deceased, for family allowance to date	4	600 00
Oct. 1.	Value of homestead set apart to the family of deceased		4,000 00
	By balance cash and property on hand		5,235 00
	Total		<u>\$10,150 00</u>

Statement of Claims.

(Here give full statement of all claims presented and allowed.)

(Report accompanying foregoing account:)

To the Honorable Superior Court of the — County of —,
California.

The undersigned, administrator of the estate of —, de-

ceased, respectfully renders the foregoing account, and reports as follows:—

1. That letters of administration of said estate were issued to him on the — day of —, A. D. 18—; that he immediately qualified and entered upon the duties of his trust;

2. That he gave due and legal notice to creditors, and the same has been duly established of record by the order of this court;

3. That within the time limited in said notice for the presentation of claims against said estate, five claims were duly presented, allowed, approved, and filed herein, as required by law; that said claims are as follows: Claim of — for \$—, based upon a promissory note executed by said decedent in his lifetime; claim of — for \$—, based upon an account for goods, wares, and merchandise sold to said decedent in his lifetime and at his request; claim of, etc. (state any other historical facts);

4. That the balance of money now in the hands of said administrator, as shown by said account, is the sum of \$—, and the claims allowed aggregate the sum of \$—; that the costs and expenses of administering said estate, including attorney's fees and commissions of administrator, amount to the sum of \$—; that the family allowance due, and which will become due before the settlement of said estate, amounts to the sum of \$—, and is a preferred claim; that the expenses of the last illness of decedent and his funeral expenses have been paid as required by law;—

Wherefore petitioner prays that a day be appointed for the hearing of said account, and that upon said hearing said account be allowed, approved, and settled, and that an order of this court be entered directing the payment of said claims as the circumstances of said estate require.

—, Attorney for Administrator. —, Administrator.

Form No. 181.—Affidavit to Account.

State of —, }
— County of —. } ss.

—, being duly sworn, says he is the administrator of the estate of —, deceased; that he has filed the foregoing account

as and for a final account of his administration of said estate; that it is in all respects just and true, and contains a statement of all his receipts and disbursements on account of said estate; that the items of expenditure, not exceeding twenty dollars, for which no vouchers are produced, have actually been disbursed by me at the place where, the date when, and to the parties to whom, the said payments are respectively stated in said account to have been made.

Subscribed and sworn to before me this — day of —
A. D. 18—. —, Notary Public.

Form No. 182.—Petition that Administrator Render an Account.

[Caption, Form No. 1, § 5, *ante*.]

1. (Follow subd. 1 of Form No. 178.)

2. That more than thirty days have elapsed since the expiration of the time mentioned in the notice to creditors within which claims must be exhibited, but said administrator has not rendered to this court under oath an account and report of his administration;

3. (Follow subd. 3 of Form No. 178);

4. (Follow subd. 4 of Form No. 178);—

Wherefore petitioner prays that said administrator be required to render an account and report of his administration.

—, Attorney for Petitioner.

—, Petitioner.

Form 183.—Order to Account on Failure to Show Cause.

[Title of Court and Estate.]

It appearing that a citation has heretofore been duly issued and served herein, requiring —, administrator of the estate of —, deceased, to show cause why he should not be required to render an account herein, and he having failed to comply with the requirements of said citation,—

It is ordered that said — render an account of his administration of the above-named estate within ten days.

Dated —, 18—.

—, Judge of the — Court.

§ 260. [1629.] Executor to Account after his Authority Revoked. — When the authority of an executor or administrator ceases, or is revoked for any reason, he may be cited to account before the court, at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator.

Arizona. — Same. Rev. Stats., sec. 1220.

Idaho. — Same. Rev. Stats., sec. 5594

Montana. — Same. Comp. Stats., p. 339, sec. 261.

Nevada. — Same. Gen. Stats., sec. 2898.

Utah. — Same. Comp. Laws, sec. 4233.

Washington. — Same. Code Proc., sec. 1064.

Wyoming. — Same. Laws 1890-91, p. 290, sec. 14.

An executor who has resigned may be compelled to account for assets received by him as such, but not accounted for: *In re Radovich*, 74 Cal. 536.

§ 261. [1630.] Revoking Authority of Executor when. — If the executor or administrator resides out of the county, or absconds, or conceals himself, so that the citation cannot be personally served, and neglects to render an account within thirty days after the time prescribed in this article, or if he neglects to render an account within thirty days after being committed where the attachment has been executed, his letters must be revoked.

Arizona. — Same. Rev. Stats., sec. 1221.

Idaho. — Same. Rev. Stats., sec. 5595.

Montana. — Same. Comp. Stats., p. 339, sec. 262.

Nevada. — Same. Gen. Stats., sec. 2899.

Utah. — Same. Comp. Laws, sec. 4234.

Washington. — Same. Code Proc., sec. 1065.

Wyoming. — Same, except that "ten" is inserted in lieu of "thirty," the last time that word occurs in the section. Laws 1890-91, p. 290, sec. 15.

See *In re Walsh*, Myr. Prob. 251.

§ 262. [1631.] To Produce and File Vouchers Which Remain in Court. — In rendering his account, the executor or administrator must produce and file vouchers for all charges, debts, claims, and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property

and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness.

Arizona. — Same. Rev. Stats., sec. 1222.

Idaho. — Same. Rev. Stats., sec. 5596.

Montana. — Same. Comp. Stats., p. 340, sec. 263.

Nevada. — Same. Gen. Stats., sec. 2900.

Oregon. — See section 1173, Hill's Laws, under § 259, *ante*.

Utah. — Same as California. Comp. Laws, sec. 4235.

Washington. — Same as California, except that last sentence is omitted. Code Proc., sec. 1066.

Wyoming. — Same as California, with this addition, "or of the executor or administrator." Laws 1890-91, p. 290, sec. 16.

The power of the court to examine the executor on his account is not limited by the fact that no specific objections have been filed: *In re Sanderson*, 74 Cal. 199.

When the evidence of payments by the executors, made for the support of the minor children, consists of the evidence of one of the executors not objected to, who testifies both to the fact of payment and to the contents of letters acknowledging the receipt of payment, no error appears in holding that the items of payment thus proven were sufficiently vouched to justify the charges, in the absence of counter-evidence: *In re Hilliard*, 83 Cal. 423.

Where, on the settlement of an administrator's account, items aggregating more than fifteen hundred dollars are allowed, for which no vouchers are produced, and as to which no testimony is given, when, where, or to whom the payments were made, held to be error: *In re Van Tassel*, 5 Pac. Rep. 611.

If proof of the correctness of an account is general and indefinite, and there are no proper vouchers, an order settling the same should be reversed: *In re Rose*, 63 Cal. 349.

§ 263. [1632.] Vouchers for Items Less than Twenty Dollars. — On the settlement of his account, he may be allowed any item of expenditure, not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to whom it was made; but such allowances in the whole must not exceed five hundred dollars against any one estate; and if, upon such settlement of accounts, it appear that debts against the deceased have been paid without the affidavit and allowance prescribed by statute or sections fourteen hundred and ninety-four, fourteen hundred and ninety-five, and fourteen hundred and ninety-six of this code, and it shall be proven by competent

evidence to the satisfaction of the court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of said accounts.

Arizona. — The portion beginning "and if," etc., to the end of section, is omitted; otherwise same. Rev. Stats., sec. 1223.

Idaho. — Same as Arizona. Rev. Stats., sec. 5597.

Montana. — Same as Arizona. Comp. Stats., p. 340, sec. 264.

Nevada. — Same as Arizona. Gen. Stats., sec. 2901.

Utah. — Same as Arizona. Comp. Laws, sec. 4236.

Washington. — Same as Arizona, except as to amount, which must not exceed three hundred dollars. Code Proc., sec. 1067

§ 264. [1633.] Day of Settlement, and Notice thereof.—When any account is rendered for settlement, the clerk of the court must appoint a day for the settlement thereof, and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. If, upon the final hearing at the time of settlement, the court, or a judge thereof, should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper. [Amended March 31, 1891. Cal. Stats. 1891, p. 428.]

Arizona. — Same, except that the "court or judge" are inserted in lieu of the "clerk of the court"; in lieu of "and," at the beginning of the second clause, the words "the clerk must" are inserted; after the words "for the settlement of the," the word "all" is omitted, and in lieu thereof the following is inserted: "Account, which must be on some day of a term of the court. The court or probate judge may order such further notice to be given as may be proper." Gen. Stats., sec. 1224.

Idaho. — Same as Arizona. Rev. Stats., sec. 5598.

Montana. — Same as Arizona. Comp. Stats., p. 340, sec. 265.

Nevada. — Same as Arizona. Gen. Stats., sec. 2902.

Utah. — Same as Arizona. Comp. Laws, sec. 4237.

Washington. — "When the account is rendered for settlement, the court, or the judge thereof, shall appoint a day for the hearing and settlement of the same, and notice of such hearing and settlement shall be given by posting notices thereof in three of the most public places in the county, and publishing a similar notice for such time as the court or judge may order in a newspaper published in the county, or if there be no newspaper published in the

county, then in a newspaper published in the state and of general circulation in the county. The notice shall set forth the name of the estate, of the executor or administrator, and the day appointed for the settlement of account, which shall be on some day not more than six weeks after the filing of the account." Code Proc., sec. 1069.

Wyoming. — "When any account is rendered for settlement, the court, or a judge thereof, must appoint a day for the settlement thereof." Laws 1890-91, p. 290, sec. 17.

When the statute requires notice of the time of settlement of accounts to be served upon the administrator, a settlement without such notice and in his absence will neither bind him nor his sureties: *In re Avenue*, 53 Cal. 259.

Form No. 184.—Order Fixing Day for Settling Account.

[Title of Court and Estate.]

Whereas —, the administrator of the estate of —, deceased, has this day filed an account of his administration of said estate,—

It is ordered that —, the — day of —, A. D. 18—, at ten o'clock, A. M., be and the same is hereby appointed as the time for the settlement of the said account, and that the clerk give notice thereof by causing notices to be posted in at least three public places in the — county of —, state of —, at least ten days before said — day of —, A. D. 18—.

Dated —, 18—. —, Judge of the — Court.

Form No. 185.—Notice of Settlement of Account.

[Title of Court and Estate.]

Notice is hereby given that the — account of the — of the estate of —, deceased, has been rendered to said court for settlement, and that Friday, the — day of —, A. D. 18—, at ten o'clock, A. M., has been duly appointed by said court for the settlement thereof, at which time any person interested in said estate may appear and file his exceptions, in writing, to said account, and contest the same.

Dated — 18—. —, Clerk.

§ 265. [1634.] **Final Settlement, Partition, and Distribution.** — If the account mentioned in the preceding section be for a final settlement, and a petition for the final

distribution of the estate be filed with said account, the notice of settlement must state those facts, which notice must be given by posting or publication for at least ten days prior to the day of settlement. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had, without further notice or proceedings. [Amended March 31, 1891. Cal. Stats. 1891, p. 428.]

Arizona. — Same as California, except that the words "for at least ten days prior to the day of settlement" are omitted, and in lieu thereof these are inserted: "As the court may direct, and for such time as may be ordered." Rev. Stats., sec. 1225.

Idaho. — Same as Arizona.

Montana. — Same as Arizona, except that notice is served, published, or waived as in sales of property. Comp. Stats., p. 234, sec. 266.

Utah. — Same as Montana. Comp. Laws, sec. 4238.

Form No. 186. Order Fixing Day for Hearing Petition for Distribution and the Settlement of Final Account.

[Title of Court and Estate.]

Whereas —, the administrator of the estate of —, deceased, has this day filed his petition for the distribution of the residue of said estate among the persons entitled thereto, and he has also filed therewith a final account of his administration of said estate, —

It is ordered that —, the — day of —, A. D. 18—, at ten o'clock, A. M., be and the same is hereby appointed as the time for the hearing of said petition for distribution and the settlement of said account, and that the clerk give notice thereof by causing notices to be posted in at least three public places in the — county of —, state of —, at least ten days before said — day of —, A. D. 18—.

Dated —, 18—. —, Judge of the — Court.

Form No. 187.—Notice of Hearing of Final Account and Petition for Distribution.

[Title of Court and Estate.]

Notice is hereby given that the final account of —, the administrator of the estate of —, deceased, has been rendered

to said court for settlement, and that a petition for a final distribution of the estate has been filed with said account, and that the — day of —, A. D. 18—, at ten o'clock, A. M., has been duly appointed by said court for the settlement of said account and hearing said petition, at which time any person interested in said estate may appear and file his exceptions, in writing, to said account, and contest the same.

Dated —, 18—.

—, Clerk.

By —, Deputy Clerk.

§ 266. [1635.] Interested Party may File Exceptions to Account.—On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions, in writing, to the account, and contest the same.

Arizona.—Same. Rev. Stats., sec. 1226.

Idaho.—Same. Rev. Stats., sec. 5600.

Montana.—Same. Comp. Stats., p. 340, sec. 267.

Nevada.—Same. Gen. Stats., sec. 2903.

Oregon.—Same. Hill's Laws, sec. 1177.

Utah.—Same. Comp. Laws, sec. 4239.

Washington.—Same. Code Proc., sec. 1070.

Wyoming.—Same, except that after the word "court" the words "or judge" are inserted.

Exceptions to an account aids to the court in scrutinizing it, but are not issues of fact to be submitted to a jury: *In re Sanderson*, 74 Cal. 199.

Interested persons, however slight their interest may be, and none other, have a right to contest the account of an administrator: *Garwood v. Garwood*, 29 Cal. 514.

A creditor has an interest in the estate of his deceased debtor, and may contest the account of the administrator: *Tompkins v. Weeks*, 26 Cal. 50.

The guardian of the estate of minor heirs, as such guardian, is a person interested in the estate and entitled to be heard; and an attorney appointed to represent the minors cannot take from such guardian said right to a hearing. He is entitled to a hearing, though he did not file his objections to the account until after a decision on an appeal from the lower court reversing its judgment; and re-

turning the cause to such court for further proceedings: *In re Rose*, 66 Cal. 241.

The court is not bound by the statement of interest in the petition to contest an account, but may take testimony on the point: *Garwood v. Garwood*, 29 Cal. 514.

A person filing an opposition, on the ground that he has a contingent claim, must state facts showing that such claim exists. An averment that for certain reasons he has been unable to determine whether or not it exists, but that upon a certain contingency it may exist, is not sufficient: *In re Halleck*, 49 Cal. 111.

In case of doubt as to the interest of a person who applies to be allowed to contest the account of an administrator, that doubt should be resolved in favor of the applicant: *Garwood v. Garwood*, 29 Cal. 514.

Where the contestants of an account state in their exceptions

thereto that they are creditors of the deceased, and are allowed by the court to contest the account, upon an appeal by the administrator, if the transcript does not show that proof was taken on the point, the presumption will be that the court acted correctly: *Tompkins v. Weeks*, 26 Cal. 50.

A legatee who was represented by counsel at the allowance of accounts against the estate will not be allowed after a lapse of time to come

in and have the allowance set aside on a mere general averment of newly discovered evidence: *Williams v. Price*, 11 Cal. 212.

When it appears that by reason of irregularities in the proceedings parties in interest have not been heard at the settlement of the annual account of the administrator, the cause will be remanded for further proceedings: *In re Runyon*, 53 Cal. 196.

Form No. 188. — Exceptions to Account.

[Title of Court and Estate.]

—, the widow of said —, deceased, hereby contests and objects to the allowance of the account rendered in the matter of the estate of said deceased by —, the administrator of said estate, and filed herein January —, 18—, and contests and objects to the allowance of each and every item of said account, for the reasons: That said account is not made under oath; that the items therein specified are exorbitant and improper charges against said estate, and are not entitled to be allowed as credits to said administrator; and more particularly this contestant objects to the allowance of the following credits, claimed by said administrator, for the reasons above charged against said account, and because they are improper and exorbitant credits, and not a proper charge against said estate, to wit:—

1. The item, "By cash paid expenses of administrator in going to Lathrop to serve order to show cause on —, \$10," for the reason that the same is exorbitant, and not a proper charge, and not a legal charge;

2. The item, "By amount due on family allowance to —, from April 11 to October 11, 1886, \$180," for the reason that the same has not been paid;

4. The item, "By cash paid Smith & Jones, attorneys for administrator, in case of — v. —, administrator, etc., \$25," for the reason that it is not a proper separate charge from the fee for attending to the estate, and is also exorbitant;

5. The item, "By cash paid Smith & Jones, attorneys for administrator in case of — v. —, administrator, etc., \$25," for same reasons as last above stated;

6. The item, "By cash paid Smith & Jones, attorneys for administrator, for services in this court in this estate, \$125," for the reason that the same is exorbitant, and not reasonably worth more than \$100, all services included;

7. Objects to the item of credit, "By real estate sold by receiver in case of — v. —, administrator, etc., \$2,000," for the reason that said real estate was set apart as a homestead for the use of the family of deceased, and was not sold as property belonging to said estate, and the surplus of the purchase price, after paying the charges and liens against said property, belong to —, the widow, and —, the daughter, of deceased, in equal shares, and not to the estate of said deceased, and said surplus of purchase price cannot be appropriated to pay the debts of said estate or of said deceased, and this contestant objects to her half thereof, to wit, \$187.75, being so appropriated, and she claims the same as her own property, free from administration;

8. Contestant objects to any part of the proceeds of the sale of the real estate belonging to said estate being used in any manner whatever for the uses or purposes of said estate, either for expenses or in payment of the debts of said estate or the claims against said estate, for the reason that said real estate was, during the administration of said estate and before the same was sold, duly set apart by this court to this contestant, —, the widow, and —, the daughter, of deceased, as a homestead, for the use of the family of deceased, composed of said widow and daughter;

That the proceeds of the sale of said real estate, after paying all claims against it, belong to this contestant and said daughter in equal shares, and not to the estate of said deceased;

That \$375.55 is the balance of such proceeds, and this contestant claims one half thereof, to wit, \$187.75, as her individual property, and objects to the same being distributed or paid out in the said estate, but claims the right to have it paid to her, this contestant;

Contestant also objects to the following claims which have been presented against said estate and allowed, for the reason that the same were not and are not due and owing or payable from said estate; that said deceased did not owe the same, or

any part thereof, at the time of his death; that at the time they were presented to said administrator, they and each of them were barred by the provisions of section — of the Code of Civil Procedure; that they are not proper claims against said estate, to wit: The claim of —, for \$—; the claim of, etc.

—, Attorneys for Contestant. —, Contestant.

§ 267. [1636.] All Matters may be Contested by the Heirs. — All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs, for cause shown. The hearing and allegations of the respective parties may be postponed from time to time, when necessary, and the court may appoint one or more referees to examine the accounts and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent.

Arizona. — Same. Rev. Stats., sec. 1227.

Idaho. — Same. Rev. Stats., sec. 5601.

Montana. — Same. Comp. Stats., p. 341, sec. 268.

Nevada. — Same. Gen. Stats., sec. 2904, 2905.

Utah. — Same. Comp. Laws, sec. 4240.

Washington. — "The hearing and allegations of the respective parties may be adjourned from time to time, as shall be necessary." Code Proc., sec. 1072.

Wyoming. — Same as California, except that in lieu of "court," "court or judge" is inserted. Laws 1890-91, p. 290, sec. 19.

See *In re Hill*, 62 Cal. 187.

A claim which has not been passed upon finally in any proceeding may be contested upon the filing of the final account of the executor: *In re Whitmore*, Myr. Prob. 103.

Probate proceedings for the sale of realty to pay an alleged

false claim will not operate as an estoppel of the minor heirs of decedent to dispute the correctness of the administrator's account as to such claim: *In re Hill*, 67 Cal. 244. In such case the burden of proof is on contestant: *In re Loshe*, 62 Cal. 415.

Form No. 189.—Appointment of Referee to Examine Account.

[Title of Court and Estate.]

—, the administrator of said estate, having filed his final account for settlement,—

It is ordered that said account be and the same is hereby

referred to George P. Royster to examine and report thereon to this court within one week, and the settlement of said account is hereby continued for one week.

Dated —, 18—. —, Judge of the — Court.

Form No. 190. — Report of Referee.

[Title of Court and Estate.]

—, the referee heretofore appointed by this court to examine the account of —, the administrator of said estate, respectfully reports that he has carefully and fully examined said account; that the same is just, true, and correct, and is entitled to be allowed and approved. —, Referee.

Dated —, 18—.

§ 268. [1637.] Settlement of Accounts Conclusive when. — The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability their right to move for cause to reopen and examine the account, or to proceed by action against the executor, or administrator, either individually or upon his bond, at any time before final distribution; and in any action brought by any such person, the allowance and settlement of the account is *prima facie* evidence of its correctness.

Arizona. — Same. Rev. Stats., sec. 1228.

Idaho. — “The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their rights to proceed against the executor or administrator, either individually or upon his bond, within two years after their respective disabilities cease; and in any action brought by any such person, the allowance and settlement of the account is *prima facie* evidence of its correctness.” Rev. Stats., sec. 5602.

Montana. — Same as California. Comp. Stats., p. 341, sec. 269.

Nevada. — Same as Idaho, except that the word “presumptive” is substituted for the words “*prima facie*.” Gen. Stats., sec. 2906.

Oregon. — “Such decree in any other action, suit, or proceeding between the parties interested or their representatives is primary evidence of the correctness of the account as thereby allowed and settled.” Hill’s Laws, sec. 1175.

Utah. — Same as California. Comp. Laws, sec. 4241.

Washington. — Same as Nevada. Code Proc., sec. 1073.

Wyoming. — Same as California, except that "court or judge" is inserted in lieu of "court." Laws 1890-91, p. 290, sec. 20.

Order Settling Account, What is: *In re Sanderson*, 74 Cal. 199.

The above section does not apply to a guardian's account. It is not made applicable by section 1789 of the California Code of Civil Procedure: *Guardianship of Cardwell*, 55 Cal. 137.

An order settling the account of an executor is conclusive of the amount with which he was chargeable: *In re Stott*, 52 Cal. 403; *Tobelman v. Hildebrandt*, 72 Cal. 313.

Such order cannot be collaterally attacked: *Brodrib v. Brodrib*, 56 Cal. 565.

An account of an administrator is not conclusive, except as to such items as are included in it, and actually passed upon by the court: *Walls v. Walker*, 37 Cal. 424.

Administrator is not bound, nor are his sureties, if his account is settled in his absence and without notice to him: *In re Aveline*, 53 Cal. 259.

An executrix is entitled to receive the rents and profits of lands devised as a part of the assets of the estate of the deceased testator until such lands are distributed, and is not liable to a personal action for the same at the suit of the devisee after the settlement of her final account, though such rents and profits were not included therein, nor at any time administered, sold, or paid out by the executrix or distributed to any person, and though the executrix was guilty of a *devastavit* in respect to such assets by neglect to account therefor. The matter of the settlement of the estate and the distribution of such assets to the person entitled thereto is under the sole jurisdiction of the probate court, and the personal obligation for the *devastavit* is only enforceable by resort to the court which settled the account: *Washington v. Black*, 83 Cal. 290.

Administrator cannot be sued after settlement and discharge for failure to commence action within statutory period to recover land of estate. Whatever his liability, it existed and ought to have been adjusted when his account was settled: *Reynolds v. Brunagim*, 54 Cal. 254; see also *Grady v. Porter*, 53 Cal. 680.

The decree of court settling ac-

counts of an administrator or executor, and fixing the amount of his liability, is conclusive upon all persons interested in the estate who are not under disability: *Washington v. Black*, 83 Cal. 290.

Court of probate cannot settle accounts of a deceased executor; that power is vested solely in a court of equity: *In re Curtiss*, 65 Cal. 572; *Chaquette v. Ortel*, 60 Cal. 594; *Bush v. Lindsey*, 44 Cal. 125.

Settlement of account is not a judgment against estate of a deceased executor, so as to make a balance due from him a preferred claim against his estate: *In re Kehoe*, Myr. Prob. 127.

Account will be reopened when it appears that by reason of irregularities some interested parties have not been heard in its settlement: *In re Runyon*, 53 Cal. 196.

What are sufficient grounds for reopening account of executor after settlement: *In re Keenan*, Myr. Prob. 186.

Settlement of executor's account cannot be set aside upon petition of children of deceased child of the testator, who were omitted from the will, alleging that they were omitted therefrom unintentionally, after the statutory period for obtaining relief against such a decree: *In re Cahalan*, 70 Cal. 604.

A statement in an account that certain funds, which are in fact loaned out, are cash on hand estops the administrator from afterwards showing or claiming that they were not cash on hand: *In re Lacosta*, Myr. Prob. 67.

As a general rule, the probate court has exclusive jurisdiction to compel an accounting, and its decree settling such account is final and conclusive, yet this rule has no application where a guardian intentionally and fraudulently concealed property from the court and ward. In such case, the settlement of his account cannot shield him from afterwards being called upon in a court of equity to account for such concealed property: *Lataillade v. Oreña*, 91 Cal. 576.

A decree approving the final account of an executor or administrator is only primary evidence of the correctness of the account as thereby settled and allowed. Such decree is not conclusive, but *prima facie* evidence only: *Cross v. Basket*, 17 Or. 84.

A decree of settlement and distribution of an estate is binding upon the administrator: *McNabb v. Wixon*, 7 Nev. 163.

§ 269. [1638.] Proof of Notice of Settlement of Accounts. — The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact.

Arizona. — Same. Rev. Stats., sec. 1229.

Idaho. — Same. Rev. Stats., sec. 5603.

Montana. — Same. Comp. Stats., p. 341, sec. 270.

Nevada. — Same. Gen. Stats., sec. 2907.

Oregon. — “Before the time appointed for the hearing and settlement of a final account, the executor or administrator shall file with the clerk a copy of the notice thereof, with the proper proof of its publication as directed.” Hill’s Laws, sec. 1181.

Utah. — Same as California. Comp. Laws, sec. 4242.

Washington. — Same as California. Code Proc., sec. 1074.

Form No. 191. — Decree Allowing Account.

[Title of Court and Estate.]

The — account of —, the administratrix of the estate of —, deceased, heretofore rendered and presented, coming on regularly to be heard this day, and proof having been made to the satisfaction of the court that the clerk had given notice of the settlement of said account in the manner and for the time heretofore ordered and directed by the court, and no objections being filed thereto, and it appearing that said account is correct, it is hereby ordered, adjudged, and decreed that the said final account of the said administratrix be and the same is hereby allowed and approved, and settled.

Dated —, 18—. —, Judge of the — Court.

§ 270. [1639.] Sale of Personal Property. — Whenever it appears to the court, on any hearing of an application for the sale of real property, that it would be for the interest of the estate that personal property of the estate, or some part of such property, should be first sold, the court may decree the

sale of such personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance.

Arizona. — Same. Rev. Stats., sec. 1230.

Idaho. — Same. Rev. Stats., sec. 5604.

Montana. — Same. Comp. Stats., p. 341, sec. 271.

Utah. — Same. Comp. Laws, sec. 4243.

§ 271. [1640.] **Funds Pending Settlement.** — Pending the settlement of any estate, on the petition of any party interested therein, and upon good cause shown therefor, the court may order any moneys in the hands of the executors or administrators to be invested for the benefit of the estate in securities of the United States or of this state. Such order can only be made after publication of notice of the petition in some newspaper to be designated by the court, or a judge thereof.

Arizona. — Same. Rev. Stats., sec. 1231.

Idaho. — Same. Rev. Stats., sec. 5605.

Montana. — Same. Comp. Stats., p. 341, sec. 272.

Utah. — Same, except that these words are omitted, "of this state," and the following substituted: "Other good securities, to be approved by the court or judge." Comp. Laws, sec. 4244.

Form No. 192. — Petition for an Order Directing Administrator to Invest Funds.

[Caption, Form No. 1, § 5, *ante*.]

1. That there is in the hands of petitioner the sum of — dollars, which is now on deposit in the Dime Savings Bank at Highland Park, county of —, state of —;

2. That for several months last past there had existed in the state of — a financial panic, and petitioner is informed that said bank has been affected thereby, and that said bank is no longer a safe and reliable depository of said funds;—

Wherefore petitioner prays that this court make an order directing that said funds be invested in such securities of the United States or of the state of —, as this court may deem advisable.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 193.—Order Directing Publication of Notice of Hearing of Foregoing Petition.

[Title of Court and Estate.]

Upon filing the petition of — for an order authorizing and directing the administrator to invest the funds of the above-named estate in such securities of the United States or of this state as the court may deem advisable,—

It is ordered that notice thereof be published one time in the —, a newspaper published in this county.

Dated —, 18—. —, Judge of the — Court.

Form No. 194.—Notice of Hearing Petition for Order to Invest Funds.

[Title of Court and Estate.]

Notice is hereby given that —, the administrator of the estate of —, deceased, has filed his petition herein praying that this court make an order directing that the funds of said estate be invested in such securities of the United States or of the state of — as this court may deem advisable, for the following reasons, to wit (here state reasons); and the hearing of said petition has been fixed for —, the — day of —, A. D. 18—, at the hour of — o'clock, — M., at the court-room of the above-named court, at which time any person may appear and present to this court his objections to the granting of such order.

[SEAL]

—, Clerk.

Dated —, 18—.

Form No. 195—Order Directing Investment of Funds.

[Title of Court and Estate.]

Now, on this — day of —, A. D. 18—, the petition of —, praying for an order directing the investment of the funds of the above-named estate, coming on regularly to be heard, and it appearing to the court that due and legal notice of the hearing thereof has been given; that there is a large amount of money, to wit, the sum of — dollars, in the hands of the administrator of said estate, uninvested; that it is to the best interest

of said estate that said money should be invested in securities of the United States or of this state, —

It is ordered that said money be invested in — bonds of the United States. — Judge of the — Court.

Dated —, 18—.

ARTICLE III.

THE PAYMENT OF DEBTS OF THE ESTATE.

- § 272. Order in which debts to be paid.
- § 273. Where property insufficient to pay mortgage.
- § 274. Estate insufficient, a dividend to be paid.
- § 275. Funeral expenses and expenses of last sickness.
- § 276. Order for payment of debts, and discharge.
- § 277. Provision for disputed and contingent claims.
- § 278. Executor personally liable to creditors when.
- § 279. Claims not included in order for payment of debts.
- § 280. Order for payment of legacies and extension of time.
- § 281. Final account, when to be made.
- § 282. Neglect to render final account.

§ 272. [1643.] Order in Which Debts to be Paid.

—The debts of the estate subject to the provisions of section twelve hundred and five must be paid in the following order:—

1. Funeral expenses;
2. The expenses of the last sickness;
3. Debts having preference by the laws of the United States;
4. Judgments rendered against the decedent in his lifetime, and mortgages, in the order of their date;
5. All other demands against the estate.

For section 1205, see California Code of Civil Procedure. It relates to liens.

Order of Payment: See § 132, *ante*, § 275, *post*.

Arizona.—Rev. Stats., sec. 1232. Subdivisions 1, 2, 3, same. Subdivision 4: "Debts having preference by the laws of this territory." Subdivisions 5 and 6 same as 4 and 5.

Idaho.—Same as California. Rev. Stats., sec. 5606.

Montana.—Same as California, to subdivision 3; then as follows: "3. The wages of each miner, mechanic, salesman, clerk, servant, or laborer, for services rendered within forty days next preceding the death of the employer, not exceeding one hundred dollars; 4. Debts due the county, territory, or United States; 5. All other demands against the estate, except that where a lien exists by mortgage, pledge, attachment, or judgment, such lien shall have preference to the extent of such demand on any specific property to which such lien may attach." Comp. Stats., p. 341, sec. 273.

Nevada. — Same as California. Gen. Stats., sec. 2908.

Oregon. — "The charges and claims against the estate which have been presented and allowed, or presented and disallowed, but subsequently established by judgment or decree within the first six months after the date of the notice of appointment of the executor or administrator, shall be paid in the following order, and those presented and allowed, or established in like manner within each succeeding period of six months thereafter, during the continuance of the administration, in the same manner: 1. Funeral charges; 2. Taxes of whatever nature due the United States; 3. Expenses of last sickness; 4. Taxes of whatever nature due the state, or any county or other public corporation therein; 5. Debts preferred by the laws of the United States; 6. Debts which at the death of the deceased were a lien upon his property, or any right or interest therein, according to the priority of their several liens; 7. Debts due employees of decedent for wages earned within the ninety days immediately preceding the death of the decedent; 8. All other claims against the estate." Hill's Laws, sec. 1183.

Utah. — Same as California, to end of subdivision 2, and then as follows: "3. All debts which were liens on the property of the decedent at the time of his death; 4. All other demands against the estate." Comp. Laws, sec. 4245.

Washington. — Code Proc., sec. 1075. Subdivisions 1, 2, and 3 same as California. Subdivision 4: "Taxes or any dues to the territory." Subdivisions 5 and 6 same as subdivision 4 and 5 of California.

Wyoming. — "All demands against the estate of any deceased person shall be divided into the following classes: 1. Funeral expenses and expenses of administration; 2. Expenses of the last sickness, and of any sums of money that may be due by decedent personally to servants and employees for services rendered within the sixty days next preceding his death; 3. Claims for medicine and medical attendance during the last sickness of the deceased; 4. Judgments rendered against the decedent in his lifetime, mortgages given by him in the order of their date, and liens upon his real estate; 5. All debts, without regard to quality, which shall be exhibited against the estate within six months after the granting of the first letters on the estate; 6. All demands thus exhibited within one year after the letters are granted." Laws 1890-91, p. 291, sec. 21.

See also § 213, *ante*.

Laborers' claims preferred: Cal. Code Civ. Proc., sec. 1205.

The debts of the community are not to be regarded as the individual debts of the husband, but as the debts of both husband and wife, for all purposes connected with the administration of the community property: *Packard v. Arellanes*, 17 Cal. 525.

Expenses of administration should be assessed proportionately upon decedent's separate and community property: *In re Patton*, Myr. Prob. 241.

Mortgage liens must be first

paid out of the proceeds of the mortgaged property: *In re Murray*, 18 Cal. 686.

Neither the administrator nor the court can change the order in which debts are to be paid, hence an order directing partnership debts to be paid before the debts of the estate are paid is void, and if he obeys the order, the sums paid under it cannot be allowed to him until all the debts of the estate are paid: *Tompkins v. Weeks*, 26 Cal. 50.

Debts created by an executor for the benefit of an estate are expenses of administration: *Dodson v. Nevitt*, 5 Mont. 518.

The fees of an administrator is an expense of administration, and should be allowed in preference even to funeral expenses: *In re Nicholson*, 1 Nev. 518.

Insurance paid on property of the estate is an expense of administration, unless it is paid under circumstances showing recklessness and want of proper care and prudence: *In re Nicholson*, 1 Nev. 518.

The priority of the United States only extends to the net proceeds of the property of the deceased, and therefore the necessary expenses of administration are first to be paid,

but this does not include the costs and expenses of defending an action where the claim was *prima facie* just, and ought to have been allowed: *United States v. Eggleston*, 4 Saw. 199.

Expenses of last illness are a "debt due from the deceased," and a debt due the United States is to be preferred to them, but if duly paid by the administrator, without notice of the claim of the United States, the priority of the latter is lost: *United States v. Eggleston*, 4 Saw. 199.

Taxes and funeral charges are not "debts due from the deceased," within the meaning of this section, but take precedence over them under the statute: *United States v. Eggleston*, 4 Saw. 199.

§ 273. [1644.] Where Property Insufficient to Pay Mortgage.—The preference given in the preceding section to a mortgage only extends to the proceeds of the property mortgaged. If the proceeds of such property is insufficient to pay the mortgage, the part remaining unsatisfied must be classed with other demands against the estate.

Arizona.—Same. Rev. Stats., sec. 1233.

Idaho.—Same. Rev. Stats., sec. 5607.

Montana.—Same. Comp. Stats., p. 342, sec. 274.

Nevada.—Same. Gen. Stats., sec. 2909.

Oregon.—"The preference given by subdivision 6 of the last section, [sec. 1183, Hill's Laws, under last section] shall only extend to the proceeds of the property upon which the lien exists, and as to such proceeds such debt is to be preferred to any of the classes mentioned in such section, other than the taxes upon such property." Hill's Laws, sec. 1184.

"If such debt has been established by judgment or decree against the deceased in his lifetime, such judgment or decree, if the proceeds of the personal property be not sufficient to satisfy it, may, in the discretion of the court or judge thereof, be either satisfied from the proceeds of the sale of the property by the executor or administrator, upon which it is a lien, or enforced by execution against such property. Such sale by the executor or administrator discharges the property from the lien of the judgment or decree, but the same attaches to the proceeds thereof after deducting therefrom the expenses of sale." Hill's Laws, sec. 1185.

Utah.—"The preference given in the preceding section to liens only extends to the proceeds of the property affected by the liens, and to the extent thereof. If the proceeds of such property is insufficient to pay the liens, the part remaining unsatisfied must be classed with other demands against the estate." Comp. Laws, sec. 4246.

Washington. — Same as California. Code Proc., sec. 1076.

Wyoming. — Same as California, with this added: "The same provisions shall apply to liens upon real estate." Laws 1890-91, p. 291, sec. 22.

See § 218, *ante*.

§ 274. [1645.] Estate Insufficient, a Dividend to be Paid. — If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid.

Arizona. — Same. Rev. Stats., sec. 1234.

Idaho. — Same. Rev. Stats., sec. 5608.

Montana. — Same. Comp. Stats., p. 342, sec. 275.

Nevada. — Same. Gen. Stats., sec. 2910.

Oregon. — Same, except that portion beginning "and no creditor" is omitted. Hill's Laws, sec. 1186.

Utah. — Same as California. Comp. Laws, sec. 4247.

Washington. — Same as California. Code Proc., sec. 1077.

Wyoming. — Same as California. Laws 1890-91, p. 291, sec. 23.

Whenever a dividend is declared, a like dividend must be deposited in court until the determination of actions pending for claims disallowed: *In re Sigourney*, 61 Cal. 71.

A dividend ordered paid to creditors being in excess of the amount in the hands of the administrator, the cause was remanded with instructions to correct the error: *In re Dorland*, 63 Cal. 281.

§ 275. [1646.] Funeral Expenses and Expenses of Last Sickness. — The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses and the expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this article, the payment has been ordered by the court.

Arizona. — Same. Rev. Stats., sec. 1235.

Idaho. — Same. Rev. Stats., sec. 5609.

Montana. — Same. Comp. Stats., p. 342, sec. 276.

Nevada. — Same. Gen. Stats., sec. 2911.

Oregon. — "The executor named in the will, or if there be none, or if he do not attend to it, then the husband, widow, or next of kin, in the order herein named, are authorized to incur funeral charges, on account of the estate, in the burial of the deceased before administration of the estate is granted; and the burial of the deceased may be in a manner and at a cost according to his cir-

cumstances and condition in life, but no funeral charges, except those necessary to give the deceased a plain and decent burial, shall be allowed out of the estate, where the assets are not sufficient to satisfy all other claims against it, including the legacies and devises, if there be any." Hill's Laws, sec. 1187.

"The executor or administrator may retain in his hands, in preference to any claim or charge against the estate, the amount of his own compensation and the necessary expenses of administration." Hill's Laws, sec. 1188.

"If an intestate leave neither widow nor minor children, all the property of the estate is assets in the hands of the administrator for the payment of funeral expenses, expenses of administration, payment of the debts of the deceased, or distribution according to law." Hill's Laws, sec. 1130.

Utah. — Same as California. Comp. Laws, sec. 4248.

Washington. — Same as California. Code Proc., sec. 1078.

"Executors and administrators of the estates of deceased persons are hereby authorized, by and with the consent of the court of the proper county, to expend a reasonable sum out of the estate of the decedent to erect a monument or tombstone suitable to mark the grave of said decedent, and the expense thereof shall be paid as expenses of administration are paid." Code Proc., sec. 1068.

Wyoming. — Same as California, except that after the words "by the court, the words "or judge" are added. Laws 1890-91, p. 291, sec. 24.

Where an administrator makes premature payment of a claim and takes a bond of indemnity, such bond is legal and binding: *Comstock v. Breed*, 12 Cal. 289.

Expenses of erection of a monument at the grave of a deceased person are funeral expenses, within the meaning of the statute authorizing payment of funeral expenses out of the estates of deceased persons: *Van Emon v. Superior Court*, 76 Cal. 589.

In an action brought by physicians, as partners, against the administrators of an estate for medical services rendered to the intestate, the

question as to whether or not the services were rendered during the last illness of the deceased, and were therefore a preferred claim under section 1646 of the Code of Civil Procedure, is an immaterial issue: *McLean v. Crow*, 88 Cal. 644.

Claims against an executor for services rendered or materials furnished to the estate during administration need not be paid until they are allowed in the settlement of his account; whether the estate is liable at all, and if so, in what account: *In re Courts*, 87 Cal. 480.

§ 276. [1647.] Order for Payment of Debts and Discharge. — Upon the settlement of the accounts of the executor or administrator, as required in this chapter, the court must make an order for the payment of the debts, as the circumstances of the estate require. If there is not sufficient funds in the hands of the executor or administrator, the court must specify in the decree the sum to be paid to each creditor. If the whole property of the estate be exhausted by such payment or distribution, such account must be considered as a final account, and the executor or administrator is entitled to his

discharge on producing and filing the necessary vouchers and proof showing that such payments have been made, and that he has fully complied with the decree of the court.

See § 259, *ante*.

Arizona. — Same. Rev. Stats., sec. 1236.

Idaho. — Same. Rev. Stats., sec. 5610.

Montana. — Same. Comp. Stats., p. 342, sec. 277.

Nevada. — Same. Gen. Stats., sec. 2912.

Oregon. — "At the first term of the court after the filing of the first semi-annual account and each semi-annual account thereafter, the court shall ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed by the executor or administrator within the first six months, or any succeeding period of six months thereafter, after the date of the notice of his appointment, after paying the funeral charges and expenses of administration; and if so, it shall so order and direct; but if the estate be insufficient for that purpose, it shall ascertain what per centum of such claims it is sufficient to satisfy, and order and direct accordingly." Hill's Laws, sec. 1172.

Utah. — Same as California. Comp. Laws, sec. 4249.

Washington. — Last sentence omitted; otherwise same as California. Code Proc., sec. 1079.

Wyoming. — Same, except that the words "order or" are inserted before "decree," and the words "or judge" are inserted after "court" whenever it occurs. Laws 1890-91; p. 291, sec. 25.

It is error for the court to order the creditors of an estate to be paid in gold coin, when the property of the estate has been sold for and paid for in legal tenders: *In re Den*, 39 Cal. 70.

A decree made by the court requiring an executor to pay money in his hands to legatees or creditors may compel the payment of the same kind of money received by the executor: *Magraw v. McGlynn*, 26 Cal. 420.

If the decedent in his lifetime made an equitable assignment of certain funds for the payment of certain debts, and such funds come into the hands of the executor or administrator, they are not general assets for the benefit of the creditors at large, but are subject in his hands to the same trust which attached to them in decedent's lifetime: *Pierce v. Robinson*, 13 Cal. 116.

A proceeding commenced by a

creditor of an estate in the probate court to compel an executor to render an account, and to obtain a decree requiring the executor to pay such creditor's claim, is in the nature of an action to recover the money which the executor has in his hands, and to which the creditor is entitled. The decree in such a proceeding is a judgment: *Magraw v. McGlynn*, 26 Cal. 420.

Money in the hands of an administrator is not assets applicable to the payment of a claim until its payment has been directed by a court of probate: *United States v. Eggleston*, 4 Saw. 199.

By paying claims in advance of in order by the court, an executor or administrator takes the risk of securing the approval of his acts by the court when his accounts and vouchers shall be presented: *Roster v. Morat*, 19 Or. 181.

§ 277. [1648.] Provision for Disputed and Contingent Claims.—If there is any claim not due, or any

contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a *pro rata* distribution is ordered.

Arizona. — Same. Rev. Stats., sec. 1237.]

Idaho. — Same. Rev. Stats., sec. 5611.

Montana. — Same. Comp. Stats., p. 342, sec. 278.

Nevada. — Same, except that the last sentence is omitted. Gen. Stats., sec. 2913.

Oregon. — "A debt due and payable is not entitled to preference over one of the same class not due, if the latter be presented within the same period. A debt not due, whether contingent or absolute, upon being presented, shall, if absolute, be satisfied by the payment of such sum as the court or judge thereof may prescribe by order, to be equal to its present value, and if contingent, by the payment into court for the benefit of the creditor, subject to the contingency, of a sum, to be ascertained in like manner, equal to its present value." Hill's Laws, sec. 1189.

Utah. — Same as California. Comp. Laws, sec. 4250.

Washington. — Same as Nevada. Code Proc., sec. 1080.

Wyoming. — Same as California. Laws 1890-91, p. 292, sec. 26.

The provisions of this section to be authenticated and presented: **are cautionary, and do not affect** *Pico v. De la Guerra*, 18 Cal. 430. **the process by which such claims are**

§ 278. [1649.] Executor Personally Liable to Creditors when. — When a decree is made by the court for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such decree, as upon a judgment in the court, in favor of each creditor, and the same proceeding may be had under such execution as under execution in other cases. The executor or administrator is liable therefor, on his bond, to each creditor.

Arizona. — Same. Rev. Stats., sec. 1238.

Idaho. — Same. Rev. Stats., sec. 5612.

Montana. — Same. Comp. Stats., p. 343, sec. 279.

Nevada. — Same. Gen. Stats., sec. 2914.

Oregon. — "When, upon the filing of a semi-annual account, an order is made determining and prescribing the amount of assets applicable to the claims then presented, as provided in section 1172 [Hill's Laws, § 276, *ante*], thereafter the executor or administrator is personally liable to each creditor included in such order for such amount." Hill's Laws, sec. 1190.

Utah. — Same as California. Comp. Laws, sec. 4251.

Washington. — Same as California. Code Proc., sec. 1081.

Wyoming. — Same as California. Laws 1890-91, p. 292, sec. 27.

Executions: Cal. Code Civ. Proc., secs. 681 et seq.; Wash. Code Proc., secs. 464 et seq.

A decree of the court ordering a claim paid on the petition of the administrator is final and conclusive, and cannot be assailed on the ground that it was rendered on insufficient evidence: *In re Cook*, 14 Cal. 129.

Claims allowed and approved cannot be garnished in the hands of an executor or administrator, where no order of distribution to creditors has been made, neither can they be seized and sold under an execution against the claimant: *Norton v. Clark*, 18 Nev. 247.

The allowance of a claim by executor and probate judge is not such a proceeding as to make the claim a judgment of a court, and so become interest-bearing. It is not a judgment until it has passed through account and settlement, and been ordered paid: *In re Selby*, Myr. Prob. 125.

A decree for the payment of money in probate proceedings cannot be enforced as for a contempt. The proper process is an execution: *Roster v. Morat*, 19 Or. 181.

§ 279. [1650.] Claims not Included in Order for Payment of Debts.—When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to the creditors, as prescribed in section fourteen hundred and ninety-one, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent and did not become absolute ten months before such day.

Arizona. — Same. Rev. Stats., sec. 1239.

Idaho. — Same. Rev. Stats., sec. 5613.

Montana. — Same. Comp. Stats., p. 343, sec. 280.

Nevada. — Same. Gen. Stats., sec. 2915.

Utah. — Same. Comp. Laws, sec. 4252.

Washington. — Same, except the time is one year. Code Proc., sec. 1082.

Decree of Distribution Bars Creditors: *In re Dall*, Myr. Prob. 159.

§ 280. [1651.] Order for Payment of Legacies and Extension of Time.—If the whole of the debts have been paid by the first distribution, the court must direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled, as provided in the next chapter; but if there be debts remaining unpaid, or if, for other reasons, the estate be not in a proper condition to be closed, the court must give such extension of time as may be reasonable for a final settlement of the estate.

Arizona. — Same. Rev. Stats., sec. 1240.

Idaho. — Same. Rev. Stats., sec. 5614.

Montana. — Same. Comp. Stats., p. 343, sec. 281.

Nevada. — Same. Gen. Stats., sec. 2916.

Oregon. — “If all the charges and claims shall have been satisfied upon the first distribution of the assets, or as soon thereafter as they may be, the court or judge thereof shall direct the payment of legacies and the distribution of the remaining proceeds of the personal property among the heirs or other persons entitled thereto.” *Hill's Laws*, sec. 1191.

Utah. — Same as California. Comp. Laws, sec. 4253.

Washington. — Same as California. Code Proc., sec. 1083.

§ 281. [1652.] Final Account, when to be Made.—At the time designated in the last section, or sooner if within that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account, and pray a settlement of his administration.

Arizona. — Same. Rev. Stats., sec. 1241.

Idaho. — Same. Rev. Stats., sec. 5615.

Montana. — Same. Comp. Stats., p. 343, sec. 282.

Nevada. — Same. Gen. Stats., sec. 2917.

Oregon. — See §§ 253 et seq., *ante*.

Utah. — Same. Comp. Laws, sec. 4254.

Washington. — Same. Code Proc., sec. 1084.

Each co-executor may keep a separate account, and present the same for final settlement. **Each is** chargeable with the full amount of assets that have come into his hands, and is entitled to be credited with all

disbursements legally made: *Hope v. Jones*, 24 Cal. 89.

By our probate law, claims against an estate which have been allowed by an administrator or executor and the judge have the force and effect of judgments. It is error in the court to reject, on the final settlement of accounts, sums paid on claims so allowed, but this rule does not apply to expenses incurred or disbursements made in due course of administration: *Deck's Estate v. Gherke*, 6 Cal. 666.

An allowed claim may be contested at the settlement of the final account if it has not already been passed upon, and the contestant is entitled to except to any adverse ruling of the court: *In re Hill*, 62 Cal. 186.

Proceedings in a probate court for sale of decedent's real property to pay an alleged forced claim will not

operate as an estoppel of the minor heirs of deceased to dispute the correctness of the administrator's account as to such claim: *In re Hill*, 67 Cal. 238.

If the final account of an executor is attacked, and he is charged with fraud and embezzlement, and is acquitted of these charges, but a sum is deducted from his account as improperly paid, it is not an error for the court to direct the jury fee to be paid out of the funds of the estate: *In re Mullins*, 47 Cal. 450.

It is error for the court to find that certain sums had been paid for the redemption of real property belonging to the estate from a tax sale, when there is nothing in the account or report or any of the proceedings upon which to base such findings: *In re Parsons*, 65 Cal. 240.

§ 282. [1653.] Neglect to Render Final Account.

— If he neglects to render his account, the same proceedings may be had as prescribed in this chapter in regard to the first account to be rendered by him; and all the provisions of this chapter relative to the last-mentioned account, and the notice and settlement thereof, apply to his account presented for final settlement.

Arizona. — Same. Rev. Stats., sec. 1242.

Idaho. — Same. Rev. Stats., sec. 5616.

Montana. — Same. Comp. Stats., p. 343, sec. 283.

Nevada. — Same. Gen. Stats., sec. 2918.

Oregon. — See §§ 253 et seq., *ante*.

Utah. — Same, to and including the words "last-mentioned account"; then as follows: "Shall apply to his account presented for final settlement, except the notice of settlement, which shall be as prescribed in section 20 of this chapter." (Said section 20 is section 4238, Compiled Laws, § 265, *ante*.) Comp. Laws, sec. 4255.

Washington. — Same as California. Code Proc., sec. 1085.

CHAPTER XI.

OF THE PARTITION, DISTRIBUTION, AND FINAL SETTLEMENT OF ESTATES.

ARTICLE I. PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

II. DISTRIBUTION ON FINAL SETTLEMENT.

III. DISTRIBUTION AND PARTITION.

IV. AGENTS FOR ABSENT INTERESTED PARTIES — DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

V. SETTLEMENT OF ACCOUNTS OF TRUSTEES AFTER DISTRIBUTION OF ESTATES, AND THEIR COMPENSATION, ETC.

ARTICLE I.

PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

§ 283. Payment of legacies upon giving bonds.

§ 284. Notice of application for legacies.

§ 285. Executor or other person may resist application.

§ 286. Decree — Partition — Costs.

§ 287. Order for payment of bond, and suit thereon.

§ 287 a. Distribution after one year.

§ 283. [1658.] Payment of Legacies upon Giving Bonds. — At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee, or legatee may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate.

Arizona. — Same. Rev. Stats., sec. 1243.

Idaho. — Same. Rev. Stats., sec. 5621.

Montana. — Same. Comp. Stats., p. 345, sec. 284.

Nevada. — Same. Gen. Stats., sec. 2919.

Oregon. — "At any time after the filing of the first semi-annual account, any heir, devisee, or legatee may apply to the court, by petition, for an order that he have the possession and rents and profits thereof of the portion of the real property to which he may be entitled, and that payment be made to him of his legacy or distributive share of the personal property of such estate, as the case may be." Hill's Laws, sec. 1193.

Utah. — Same as California. Comp. Laws, sec. 4256.

Washington. — Same as California, except that the time is six months. Code Proc., sec. 1086. See also § 487, *post*.

Wyoming. — Same as Washington. Laws 1890-91, p. 292, sec. 1.

See § 135, *ante*, and notes.

Payment of Legacy: See § 445, *post*.

An executor is not authorized to petition for a partial distribution of estate: *In re Letellier*, 74 Cal. 311.

"Heir" signifies all who are entitled to succeed to the property of decedent, and includes widow: *In re Ricaud*, Myr. Prob. 158.

Superior court has jurisdiction, upon petition for partial distribu-

tion of estate, under sections 1658 and 1659 of Code of Civil Procedure, to determine a question of contested heirship or right to inherit, though the right is claimed by reason of the adoption of an illegitimate child of the deceased, without a prior determination of that right under section 1664 of said code: *In re Jessup*, 81 Cal. 408.

Form No. 196. — Petition for Partial Distribution Prior to Final Settlement.

[Caption, Form No. 1, § 5, *ante*.]

1. That petitioner is one of the heirs at law of —, deceased, to wit, a son, and, as such, is entitled to one third of the residue of said estate, after the payment of debts, etc.; that the only other heirs at law of said deceased are — and —, both residents of the — county of —, in this state; that said deceased died intestate;

2. That more than four months have elapsed since the issuance of letters of administration of said estate to —, who is the duly appointed, qualified, and acting administrator thereof; that said estate is but little indebted; that the debts outstanding against said estate, and the costs, expenses, and charges of administration will probably not exceed the sum of five hundred dollars;

3. That there is a large amount of assets in the hands of said administrator, to wit, the sum of about ten thousand dollars; —

Wherefore petitioner prays that this court make an order distributing to petitioner the share of said estate to which he is entitled upon his delivering to said administrator such bond as is required by law.

—, Petitioner.

—, Attorney for Petitioner.

§ 284. [1659.] Notice of Application for Legacies. — Notice of the application must be given to the executor or administrator, personally, and to all persons interested

in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator.

Arizona. — Same. Rev. Stats., sec. 1244.

Idaho. — Same. Rev. Stats., sec. 5622.

Montana. — Same. Comp. Stats., p. 345, sec. 285.

Nevada. — Same. Gen. Stats., sec. 2920.

Oregon. — "Notice of the application shall be given to the executor or administrator ten days before the term at which it is made." Hill's Laws, sec. 1194.

Utah. — Same as California. Comp. Laws, sec. 4257.

Washington. — Same as California. Code Proc., sec. 1087.

Wyoming. — Same as California. Laws 1890-91, p. 293, sec. 2.

See *Abila v. Burnett*, 33 Cal. 658.

Notice: See § 264, *ante*.

§ 285. [1660.] Executor or Other Person may Resist Application. — The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself.

Arizona. — Same. Rev. Stats., sec. 1245.

Idaho. — Same. Rev. Stats., sec. 5623.

Montana. — Same. Comp. Stats., p. 345, sec. 286.

Nevada. — Same. Gen. Stats., sec. 2921.

Utah. — Same. Comp. Laws, sec. 4258.

Washington. — Same. Code Proc., 1088.

Wyoming. — Same. Laws 1890-91, p. 293, sec. 3.

Form No. 197. — Objections to Partial Distribution.

[Title of Court and Estate.]

—, the executor of the last will and testament of —, deceased, objects to the granting of the petition of —, one of the legatees under said will, and for grounds thereof alleges: —

That the estate of said decedent is heavily indebted, to wit, in the amount of about \$—, and the share of said — cannot be allowed to him without loss to the creditors of the estate, and that the allegations in said petition are not true; —

Wherefore he prays that the order sought in said petition be denied.

—, Executor.

—, Attorney for Executor.

§ 286. [1661.] Decree — Partition — Costs. — If, at

the hearing, it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring, —

1. Each heir, legatee, or devisee obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the court, or a judge thereof, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate to which he is entitled;

2. The executor or administrator to deliver to the heir, legatee, or devisee the whole portion of the estate to which he may be entitled, or only a part thereof, designating it. If, in the execution of the order, a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally amongst them.

Arizona. — Same. Rev. Stats., sec. 1246.

Idaho. — Same. Rev. Stats., sec. 5624.

Montana. — Same. Comp. Stats., p. 345, sec. 287.

Nevada. — Same. Gen. Stats., secs. 2922-2925.

Oregon. — “If, upon the hearing, it appear that the estate is but little in debt, the court, in its discretion, may grant the petition, or some part thereof, upon the condition that such applicant file with the clerk, within a time in the order specified, an undertaking, with one or more sufficient sureties, for the benefit of whom it may concern, in a sum double the value of such real property, legacy, or distributive share, to be void upon the condition that such heir, legatee, or devisee will pay, when required, his proportion towards satisfying any claim against the estate.” Hill’s Laws, sec. 1194.

“The sureties in such undertaking shall have the same qualifications as sureties in bail upon arrest, and shall justify before the court or judge thereof in like manner. The costs of the proceeding shall be paid by the applicant.” Hill’s Laws, sec. 1195.

Utah. — Same as California. Comp. Laws, sec. 4259.

Washington. — Same as California, except that the words “or a judge thereof,” in the ninth line, are omitted. Code Proc., secs. 1089-1092.

Wyoming. — Same as California, except that “judge or clerk” may approve the bond. Laws 1890-91, p. 293, sec. 4.

Taxes: See § 293, *post*.

Qualification of Sureties: See § 76, *ante*.

Partition: See § 294, *post*.

Recording Order: See § 329, *post*.

The court may order a part payment of a legacy to the legatee under the above section when the executor has sufficient funds on hand to pay the same, although said funds amount to no more than the commissions that will be due the executor on final settlement, if it appears that the remaining assets are sufficient to pay the commissions and all other claims against the estate: *In re Dunne*, 65 Cal. 378.

An order of partial distribution is appealable by the executor, but will not be reversed unless the record shows that the condition of the estate was not such as to justify the order: *In re Kelley*, 63 Cal. 106.

An order of the court made without notice to all the parties

interested in the estate, awarding the widow a certain portion of the personal estate, when the debts chargeable to the estate are not settled, is void; and this although she is entitled to the same under specific devise in the will, for devises will not be exonerated from the payment of debts, etc., where the residue of the estate is insufficient for that purpose. If such portion of the estate has passed into her hands as her own, and she is one of the executors administering the estate, such property must be considered as part of the estate in her hands as executrix, and if it is not in being, then she is chargeable in her accounts with it: *Abila v. Burnett*, 33 Cal. 658.

Form No. 198.—Decree for Partial Distribution.

[Title of Court and Estate.]

Now, on this — day of —, A. D. 18—, the petition of — for partial distribution of the property of the estate of —, deceased, coming on regularly for hearing, and it appearing that notice hereof has been duly and legally served upon the administrator and all persons interested in said estate; that more than four months have elapsed since the issuance of letters of administration upon said estate; that said estate is but little indebted; that the debts outstanding against said estate, together with the costs, expenses, and charges of administration, will probably not exceed the sum of five hundred dollars; that there is a large amount of assets, to wit, the sum of ten thousand dollars, in the hands of said administrator, of which the distributive share of the petitioner will be about the sum of three thousand three hundred dollars; —

It is therefore ordered that said administrator pay over to said petitioner, —, the sum of twenty-five hundred dollars as a portion of his share of said estate, upon the giving by him to said administrator of a bond, conditioned according to law, in the sum of five hundred dollars, with two or more sufficient sureties, to be approved by a judge of this court.

Dated —, 18—.

—, Judge of the — Court.

Form No. 199.—Bond Given on Distribution Prior to Final Settlement.

Know all men by these presents, that we, — as principal, and — and — as sureties, are held and firmly bound to —, the administrator (executor) of the estate of —, deceased, in the sum of — dollars, lawful money of the United States of America, to be paid to the said administrator, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this — day of —, A. D. 18—.

The condition of the above obligation is such, that whereas, on the — day of —, A. D. 18—, the — court of the — county of —, state of —, by its order duly made and entered therein authorizing and directing said administrator (executor) to pay over to —, one of the heirs at law of said decedent, the whole of his share of the property of said estate, upon his delivering to such administrator a bond in said penal sum, conditioned according to law;—

Now, therefore, if the above-bounden principal shall well and truly pay, or cause to be paid, whenever required so to do, his proportion of the debts due from the estate of said decedent, to an amount not exceeding the value and amount of his portion of said estate, to wit, the sum of \$—, so paid to him by authority of said order, then this obligation to be void, otherwise to remain in full force and effect.

— [SEAL]

— [SEAL]

— [SEAL]

Justification as in Form No. 53, § 71, *ante*.

§ 287. [1662.] Order for Payment of Bond, and Suit thereon.—When any bond has been executed and delivered, under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why

the order should not be made. At the hearing, the court, if satisfied of the necessity of such payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the money is not paid within the time allowed, an action may be maintained by the executor or administrator on the bond.

Arizona. — Same. Rev. Stats., sec. 1247.

Idaho. — Same. Rev. Stats., sec. 5625.

Montana. — Same. Comp. Stats., p. 346, sec. 288.

Nevada. — Same. Gen. Stats., sec. 2926.

Oregon. — “If, after the giving of such undertaking, it shall become necessary to satisfy any claim against the estate, to require the payment of all or any part of the sum therein specified, it shall be the duty of the executor or administrator to apply by petition to the court for a decree to that effect. Notice of the application shall be given to the party filing the undertaking ten days before the term at which the application is made.” Hill’s Laws, sec. 1196.

“If, upon the hearing, it appear necessary and proper that such payment should be made, the court shall decree accordingly, specifying therein the amount to be paid, and within what time; and if the amount be not paid within the time specified, the decree may be enforced against such party and the sureties in the undertaking by execution in the same manner as a decree in the circuit court.” Hill’s Laws, sec. 1197.

Utah. — Same as California. Comp. Laws, sec. 4260.

Washington. — Same as California. Code Proc., sec. 1093.

Citation: See §§ 317-321, *post*.

Form No. 200.—Petition for an Order Requiring Legatee, etc., to Refund Sufficient Money to Pay Debts of an Estate.

[Caption, Form No. 1, § 5, *ante*.]

1. That heretofore this court duly made and entered its order requiring petitioner, as administrator of the above-named estate, to pay to —, one of the heirs at law of said decedent, the sum of two thousand five hundred dollars upon the giving of a bond to said administrator in the penal sum of five thousand dollars, conditioned according to law;

2. That thereafter, on the — day of —, A. D. 18—, said — gave to said administrator said bond, as required in said order, and thereupon, in pursuance of said order, said administrator paid to him said sum of two thousand five hundred dollars;

3. That the debts, costs, charges, and expenses of administration have far exceeded the estimate placed upon them by the court in making said order, and amount to the sum of five thousand dollars, instead of the sum of five hundred dollars, as stated in said order;

It is therefore necessary that said — should refund a portion of said sum of two thousand five hundred dollars to cancel the indebtedness of said estate;—

Wherefore petitioner prays that said — be required to pay to the administrator of said estate, out of the sum so received by him as aforesaid, a sum sufficient to liquidate his share of the indebtedness of said estate. —, Petitioner.

—, Attorney for Petitioner.

Form No. 201.—Order Requiring Legatee, etc., to Refund Sufficient Money to Pay Debts of an Estate.

[Title of Court and Estate.]

The petition of —, the administrator of the above-named estate, coming on regularly for hearing this day, and it appearing that a citation has been duly issued herein and served upon —, one of the heirs at law of said decedent, requiring him to show cause on this day why he should not be required to refund to the administrator of said estate a sufficient sum out of the funds heretofore received by him, under and by virtue of an order of this court herein, to pay his proportion of the indebtedness of said estate, and no sufficient reason being shown by him why he should not be required to do so, and it appearing that in order to cancel the indebtedness of said estate it is necessary that said — should refund to said administrator the sum of — dollars;—

It is therefore ordered that said — be and he is hereby required to pay to said administrator out of said funds said sum of — dollars within ten days from this date.

Dated —, 18—. —, Judge of the — Court.

§ 287 a. [1663.] Distribution after One Year. —
At any time after the lapse of one year from the issuance of letters testamentary or of administration, any heir, devisee, or

legatee may present his or her petition to the court for the distribution of the net proceeds of the share of the said estate to which he or she will be entitled. Notice of the application must be given as required by section sixteen hundred and fifty-nine.¹ The executor or administrator, or any other person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself. If, at the hearing, it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring,—

1. Each heir, legatee, or devisee obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the court, or a judge thereof, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the amount or portion of the proceeds of the estate which he has received; *provided*, that where the time for filing or presenting claims has expired, and all claims that have been allowed have been paid, or are secured by mortgage upon real estate sufficient to pay them, and the court is satisfied that no injury can result to the estate, the court may dispense with the bond;

2. The executor or administrator to deliver to the heir, legatee, or devisee the proceeds of the estate to which he may be entitled, or only a part thereof, designating it. If, in the opinion of the court, it be necessary, in order to ascertain the proceeds, that any or all of the heirs, legatees, or devisees may be entitled, that the interest of any heir, legatee, or devisee in one or more pieces or parcels of property of the estate shall be determined or ascertained, the court may suspend proceedings and direct the petitioner or petitioners to take proceedings under section sixteen hundred and sixty-four² of this code to ascertain the interest the petitioner or petitioners will have

¹ For section 1659, see § 284, *ante*.

² For section 1664, see § 288, *post*.

under the will in any piece or parcel of property. The order must describe the property in relation to which proceedings are to be taken. Whenever any bond has been executed and delivered, proceedings upon any such bond may be taken under section sixteen hundred and sixty-two.¹ The costs of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally between them.

Petition for Distribution: See Form No. 195, *ante*.

Objections to Distribution: See Form No. 196, *ante*.

Decree of Distribution: See Form No. 197, *ante*.

Bond on Distribution: See Form No. 198, *ante*.

Petition for Order to Refund: See Form No. 199, § 287, *ante*.

Order to Refund: See Form No. 200, § 287, *ante*.

ARTICLE II.

DISTRIBUTION ON FINAL SETTLEMENT.

§ 288. Procedure to determine interests in estate.

§ 289. Distribution of estate, how made, and to whom.

§ 290. What the decree must contain.

§ 291. Distribution when decedent not resident of state.

§ 292. Decree to be made only after notice.

§ 293. No distribution till all taxes on personal property paid.

§ 288. [1664.] Proceedings to Determine Interest in Estate.—In all estates now being administered, or that may hereafter be administered, any person claiming to be heir to the deceased, or entitled to distribution in whole or in any part of such estate, may, at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate, file a petition in the matter of such estate, praying the court to ascertain and declare the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made. Upon the filing of such petition, the court shall make an order directing service of notice to all persons interested in said estate to appear and show cause, on a day to be therein named, not less than sixty days nor over four months from the date of the making of such order, in which notice shall be set forth the name of the deceased, the name of the executor or administrator of

¹ For section 1662, see last section.

said estate, the names of all persons who may have appeared claiming any interest in said estate in the course of the administration of the same, up to the time of the making of said order, and such other persons as the court may direct, and also a description of the real estate whereof said deceased died seised or possessed, so far as known, described with certainty to a common intent, and requiring all said persons, and all persons named or not named having or claiming any interest in the estate of said deceased, at the time and place in said order specified, to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership, or interest in said estate, to said court, which notice shall be served in the same manner as a summons in a civil action, upon proof of which service, by affidavit or otherwise, to the satisfaction of the court, the court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties in and to the property of said deceased, and such determination shall be final and conclusive in the administration of said estate, and the title and ownership of said property. The court shall enter an order or decree establishing proof of the service of such notice. All persons appearing within the time limited, as aforesaid, shall file their written appearance in person or through their authorized attorney,¹ such attorney filing at the same time written evidence of his authority to so appear,² entry of which appearance shall be made in the minutes of the court and in the register of proceedings of said estate. And the court shall, after the expiration of the time limited for appearing as aforesaid, enter an order adjudging the default of all persons for not appearing as aforesaid, who shall not have appeared as aforesaid.¹ At any time within twenty days after the date of the order or decree of the court establishing proof of the service of such notice, any of such persons so appearing may file his complaint in the matter of the estate, setting forth the facts constituting his claim of heirship, ownership, or interest in said estate, with such reasonable particularity as the court may require, and serve a copy of the same upon each of the parties or attorneys who shall have entered their written appearance as aforesaid, if such parties or such attor-

neys reside within the county; and in case any of them do not reside within the county, then service of such copy of said complaint shall be made upon the clerk of said court for them, and the clerk shall forthwith mail the same to the address of such party or attorney as may have left with said clerk his post-office address. Such parties are allowed twenty days after the service of the complaint, as aforesaid, within which to plead thereto, and thereafter such proceedings shall be had upon such complaint as in this code provided in case of an ordinary civil action; and the issues of law and of fact arising in the proceeding shall be disposed of in like manner as issues of law and fact are herein provided to be disposed of in civil actions, with a like right to a motion for a new trial and appeal to the supreme court; and the provisions in this code contained regulating the mode of procedure for the trial of civil actions, the motion for a new trial of civil actions, statements on motion for a new trial, bills of exception, and statements on appeal, as also in regard to undertakings on appeal, and the mode of taking and perfecting appeals, and the time within which such appeals shall be taken, shall be applicable thereto; *provided, however*, that all appeals herein must be taken within sixty days from the date of the entry of the judgment or the order complained of. The party filing the petition as aforesaid, if he file a complaint, and if not, the party first filing such complaint, shall, in all subsequent proceedings, be treated as the plaintiff therein, and all other parties so appearing shall be treated as the defendants in said proceedings, and all such defendants shall set forth in their respective answers the facts constituting their claim of heirship, ownership, or interest in said estate, with such particularity as the court may require, and serve a copy thereof on the plaintiff. Evidence in support of all issues may be taken orally or by deposition, in the same manner as provided in civil actions. Notice of the taking of such depositions shall be served only upon the parties, or the attorneys of the parties, so appearing in said proceeding. The court shall enter a default of all persons failing to appear, or plead, or prosecute, or defend their rights as aforesaid; and upon the trial of the issues arising upon the pleadings in such proceeding, the court shall determine the

heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof, and the final determination of the court thereupon shall be final and conclusive in the distribution of said estate, and in regard to the title to all the property of the estate of said deceased. The cost of the proceedings under this section shall be apportioned in the discretion of the court.² In any proceeding under this section, the court may appoint an attorney for any minor mentioned in said proceedings not having a guardian. Nothing in this section contained shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title, or interest in the estate so distributed, where the same shall not have been determined under the provisions of this section; but where such questions shall have been litigated, under the provisions of this section, the determination thereof as herein provided shall be conclusive in the distribution of said estate.

Wyoming. — Same, except that all is omitted from figure 1 to figure 2, wherever such figures appear in above California section (1664), and that the time for hearing, in second sentence, is as follows: "To appear and show cause at the first day of the next ensuing term of the court, held in the county where said order is made, in which notice," etc. This sentence is also inserted, viz.: "And the court shall, after the expiration of the time limited for appearing as aforesaid, enter an order adjudging the default of all persons for not appearing as aforesaid, who shall not have appeared as aforesaid." Laws 1890-91, pp. 294, 295, sec. 10.

Effect of Judgment. — "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state . . . having jurisdiction to pronounce the judgment or order is as follows: 1. In case of a judgment or order against a specific thing, or in respect to the probate of a will or the administration of the estate of a decedent, . . . the judgment or order is conclusive upon the title to the thing, the will, or administration": Cal. Code Civ. Proc., sec. 1908.

The judgment to be rendered by a court upon the petition of a child of a decedent for letters of administration upon the ancestor's estate will determine for all time and in all courts, so far as the parties to the proceedings are concerned, whether petitioner is the child of decedent, and for that

reason entitled to letters of administration upon his estate in preference to collateral kindred: *Howell v. Budd*, 91 Cal. 350.

The word "party," as used in the California Code of Civil Procedure, section 170, includes persons whose interests are represented by parties: *Howell v. Budd*, 91 Cal. 352.

The fact that a petition has been filed in accordance with the provisions of the above section, and citation issued thereon, is no ground for a continuance, at the instance of the petitioner, of proceedings by the executor of the estate for final distribution, begun on the day citation issued on said petition: *In re Oxarart*, 78 Cal. 109.

An administrator, having been made a formal party defendant in a contest between heirs, to settle the rights of all persons in the estate, filed

cross-interrogatories, and applied to have them annexed to a commission to take depositions which had been issued. His application was refused, whereupon he filed a petition for *mandamus* to compel the probate judge to grant it, and it was held that the administrator was not entitled to contest the claim of the parties to heirship in the estate or to distribution, and that *mandamus* would not lie: *Roach v. Coffey*, 73 Cal. 281.

Determination of Heirship — "Special Proceeding." — The determination of the heirship of claimants to an estate is a "special proceeding," within the meaning of that

term as defined in the Code of Civil Procedure, and the court, in the exercise of its jurisdiction, is limited to the terms and conditions of the statute under which the proceedings are authorized: *Smith v. Westerfield*, 88 Cal. 374.

Time for Proceeding — Jurisdiction. — The court has no jurisdiction to determine the heirship of a deceased person until after the expiration of one year from the issuing of letters of administration upon the estate, and has no power to determine it until upon or after the settlement of the final accounts of the administrator: *Smith v. Westerfield*, 88 Cal. 374.

Form No. 202. — Petition to Determine Interests in Estate.

[Title of Court and Estate.]

The petition of — respectfully shows: —

That more than one year has expired since the issuance of letters testamentary herein; that petitioner is a devisee under the last will and testament of —, deceased (or that petitioner is the widow and one of the heirs at law of deceased);

That the rights of the various persons claiming an interest in the estate of said deceased have not been determined by any judgment, order, or decree of any court of competent jurisdiction; —

Wherefore petitioner demands that an order be made and entered herein, as provided by section 1664 of the Code of Civil Procedure, requiring all persons interested in said estate to set forth the nature of their claim on or before a day to be specified in said order, not less than sixty days nor more than four months from the date of said order, and that this court ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution of said estate should be made.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 203. — Order and Citation on the Foregoing Petition.

[Title of Court and Estate.]

Upon reading and filing the petition of —, praying this court to ascertain and declare the rights of all persons inter-

ested in the estate of —, deceased, and to whom distribution thereof should be made;—

It is ordered that the following named persons be made parties to this proceeding, to wit, —, executor of said estate, — and —, the heirs at law of said deceased, and —, —, and —, all the legatees and devisees of said decedent, and — and —, persons who claim some interest in the estate of said decedent, and John Doe and Richard Roe, whose real names are unknown, and who are therefore mentioned by fictitious names, they being persons who claim some interest in said estate.

It is further ordered that all persons interested in said estate, including the persons above named, appear on the — day of —, A. D. 18—, and set forth the nature and extent of their respective claims in, to, or upon the property and estate of said decedent, of which the following described real property forms a part (here insert a description of all the real property belonging to the estate).

It is further ordered that a notice containing a statement of the matters mentioned in this order be served upon all persons interested in said estate in the same manner as summons in a civil action.

—, Judge of the — Court.

Dated —, 18—.

For form of notice, see Form No. 29, § 26, *ante*.

Form No. 204.—Order Establishing Proof of Service of Citation.

[Title of Court and Estate.]

It is ordered that due and legal service has been made upon the persons hereinafter named of the notice of the proceedings herein as directed, by the order of this court heretofore made and entered herein, in the matter of ascertaining and declaring the rights of all persons interested in the estate of —, deceased, and to whom distribution thereof should be made, to wit (here insert names), and the same is hereby established of record.

—, Judge of the — Court.

Dated —, 18—.

Form No. 205. — Authority of Attorney in Matters of Heirship.

[Title of Court and Estate.]

I hereby authorize —, Esq., an attorney and counselor at law, of the state of —, to appear for me in the above-entitled court and cause, and represent me and my interest in the matter of the determination of the rights of all persons to the above-named estate, and all interest therein, and to whom distribution thereof should be made, and I further authorize my said attorney to do and perform all things necessary in the premises as I could or might do if personally present. —

Dated —, 18—. —

NOTE. — The court does not take judicial knowledge of the signature of private individuals. It would therefore be well to have the foregoing authority acknowledged before a proper officer.

Form No. 205 a. — Complaint in Matters of Heirship.

[Title of Court and Estate.]

Now comes —, and filing his complaint in the matter of ascertaining and declaring the rights of the heirs and all persons to the property of the estate of —, deceased, and all interests therein, and to whom distribution thereof should be made, alleges: —

1. That he is the son of said decedent, and one of his heirs at law;
2. That the other heirs at law of said decedent are —, his widow, and — and —, his children;
3. That the community property of said estate is as follows, to wit (here insert description of community property);
4. That the separate property of said decedent is described as follows, to wit (here insert description of separate property);
5. That of said community property plaintiff, —, is entitled to one sixth, and said plaintiff is entitled to one fourth of said separate property; —

Wherefore said plaintiff prays that this court will declare by its judgment herein that he is entitled to share in the property and estate of said decedent as above claimed by him.

—, Attorney for Plaintiff.

Form No. 206. — Answer in Matters of Heirship.

The answer is in all respects the same in form as the complaint, except that the word "answer" takes the place of the word "complaint," and the word "defendant" takes the place of the word "plaintiff," wherever they occur. (See form No. 205, *ante*.) If it is necessary to deny any allegation of the plaintiff or of any co-defendant, such denials should follow a statement of the claims of the defendant, in the answer in the same manner as denials to a complaint in any other proceeding or action would be made.

Form No. 207. — Decree in Matters of Heirship.

[Title of Court and Estate.]

Now, on this — day of —, A. D. 18—, this cause coming on to be heard upon the complaint of —, and the answers of —, —, and —, and the evidence, both oral and documentary, having been introduced by the respective parties, and the cause having been submitted to the court for its decision, and the court being fully advised, —

It is adjudged that —, the widow of deceased, is entitled to one half of all the community property of said decedent, and also that she is entitled to one fourth of all the separate property of decedent; that —, —, and — are each entitled to one sixth of said community property of said decedent, and they are each entitled to one fourth of the said separate property of decedent;

That said community property is described as follows, to wit (here insert description);

That said separate property is described as follows, to wit (here insert description).

It is hereby further ordered and adjudged that the costs of this proceeding shall be paid *pro rata* by the parties hereto in proportion to the amount which each is entitled to receive as his distributive share of said estate, and said costs are hereby taxed at the sum of \$—.

Dated —, 18—. —, Judge of the — Court.

NOTE.—The other proceedings herein are in all respects the same as similar proceedings in ordinary civil actions.

§ 289. [1665.] Distribution of Estate, how Made, and to Whom. — Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee, or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, and the issue of other children, and any of them, before the close of administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed to the other heirs at law. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final accounts, must be reported and filed at the time of making such distribution, and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court and included in the order or decree; or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts.

Arizona. — Same. Rev. Stats., sec. 1248.

Idaho. — Same. Rev. Stats., sec. 5626.

Montana. — Same. Comp. Stats., p. 346, sec. 289.

Nevada. — The first clause of the first sentence of section same; remainder of sentence omitted. Second sentence same, except that the following clause, "unless distribution of the real estate only be made," is inserted after the word "distribution." Gen. Stats., sec. 2927.

Utah. — Same as California. Comp. Laws, sec. 4261.

"The rights of a purchaser or encumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless the instrument containing such devise is duly proved as a will, and recorded in the office of the clerk of the probate court having jurisdiction thereof, or unless written notice of such devise is filed with the recorder of the county where the real property is situated, within four years after the deviser's death." Comp. Stats., sec. 2725.

Washington. — "Upon the settlement of the account of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee, or legatee, the court shall proceed to distribute the residue of the estate among the persons who are by law entitled." Code Proc., sec. 1094.

Wyoming.—“At any time after one year from the date of appointment, whenever the estate is in condition for distribution, any executor or administrator may make final settlement of said estate in the following manner: He shall publish for four weeks, in some newspaper in the state of general circulation in the county in which the estate is situated, a notice to all creditors and others interested in the estate that he intends to make final settlement at the next term of the district court. At that term of court, if it appears that such notice was duly published, and that the estate has been fully administered, and that final settlement of all the accounts of the executor or of the administrator have been made, the court must proceed, on the application of the executor or administrator, or of any legatee or devisee, to distribute the residue of the estate in the hands of such executor or administrator to any, among the persons who are by law entitled thereto, and in the proportions as now provided by law; and if the decedent has left a surviving child, and the issue of other children, and any of them, before the close of administration, have died while under age, and have not been married, no administration on such deceased child's estate is necessary, but all the estate which the decedent's deceased child was entitled to by inheritance must, without administration, be distributed to the other heirs at law in their proper proportions.” *Laws 1890-91, pp. 293, 294, sec. 5.*

Jurisdiction: See Cal. Code Civ. Proc., sec. 97, subd. 7.

Citation and Notice: See §§ 317-321, *post*, § 264, *ante*.

The estate is not ready for distribution when there is not an ascertained balance of assets in the hands of the administrator, or the assets are merely claimed to exist, or the right to them is involved in litigation. It is in the discretion of the court to delay the distribution until the right to the assets is judicially determined and the balance of assets for distribution is ascertained: *In re Ricaud*, 57 Cal. 421.

Distribution is mandatory when the estate is ready for it: *In re Pritchett*, 51 Cal. 568; *In re Ricaud*, 57 Cal. 421.

A surety of an administrator cannot question the validity of a decree settling the account of the administrator and distributing the estate, if it shows that proof was made to the satisfaction of the court that notice was given as required by law: *McClellan v. Downey*, 63 Cal. 520.

If, in the distribution of a husband's estate, the widow having died after his decease, an order of distribution is entered by which the widow's interest in the community property is distributed to her heirs, such a decree may be properly entered by the court,

if none of her creditors object: *McClellan v. Downey*, 63 Cal. 520.

When an alternative writ of prohibition is sued out to compel a stay of proceedings in respect to the distribution of an estate, pending an appeal from an order settling the final account of the executor, if the heirs allege and show, upon a petition by them asking for a dismissal of the alternative writ of prohibition, that they have withdrawn their petition for final distribution by leave of court, and stipulate that they will not apply for final distribution pending the appeal, the application for dismissal of the writ will be granted at costs of the moving party: *Pezuela v. Superior Court*, 83 Cal. 49.

Probate court has power to construe will so as to ascertain who are distributees: *In re Crooks*, Myr. Prob. 247.

Power of court to distribute to trustees to carry out a charitable trust: *In re Hinckley*, 58 Cal. 457.

The probate court has no power to appropriate the share of an heir or devisee to the payment of his debts. Its power only extends to pay-

ing claims against the estate and distributing the remainder to the heirs and devisees: *In re Nerac*, 35 Cal. 392.

A decree distributing the estate of a deceased person, settling the accounts of the executor, and discharging him, is not void on the ground that it was premature, and to that extent in excess of the court's jurisdiction, when there is nothing in the decree showing assets in the hands of the executor when it was entered: *Dean v. Superior Court*, 63 Cal. 473.

A decree annulling a will, made after distribution, does not render the decree of distribution void. It is valid as to subsequent *bona fide* purchasers for value from the distributees: *Thompson v. Samson*, 64 Cal. 330; *Fitch v. Miller*, 20 Cal. 383; *Stevenson v. Superior Court*, 62 Cal. 60.

After the decree of distribution is entered, money distributed to an heir or devisee may be garnished in the hands of an administrator by a creditor of the former, or may be reached by proceedings supplementary to execution: *In re Nerac*, 35 Cal. 392.

When a decree of distribution is made, the court loses all jurisdiction in the matter, except to compel the delivery of the property to the distributees. The distributees, from the date of such order, have an action to recover the estate, or in proper cases its value: *Wheeler v. Bolton*, 54 Cal. 302; *Ex parte Smith*, 53 Cal. 204.

Upon a final settlement of the accounts of an executor or administrator, the court must distribute the residue of the estate, if application is made therefor, even if there are persons living who may yet contest the validity of the will: *In re Pritchett*, 51 Cal. 568; 52 Cal. 94.

Where the devisee or heir has died pending administration, the estate of such decedent should first be administered and distributed, and the parties entitled under such distribution may then apply for distribution to them of the share in the estate of the former decedent to which such heir or devisee would have been entitled: *In re Cronin*, Myr. Prob. 252.

The probate court has no power to direct that the portion of an estate originally allotted to one of deceased's heirs at law, who is a non-resident,

shall be distributed among the other heirs: *Pyatt v. Brockman*, 6 Cal. 418.

The universal rule is, that the distribution of decedent's personalty will be governed by the laws of his domicile at the time of his death. This rule has not been changed in California: *In re Apple*, 66 Cal. 432.

Personalty in this state of one dying testate in Austria, whose domicile at the time of his death was in Nevada, is to be distributed according to the law of Nevada: *In re Apple*, 66 Cal. 432.

Distribution will be made under the laws of this state, if in an antenuptial contract made in France, to which decedent was a party, each of the future spouses gives or conveys to the survivor of them all the property which the first one dying shall leave, except what the law gives to the children of the marriage. The latter take under the law of this state when one of the parents dies in this state leaving property here. They do not take under the contract: *In re Baubichon*, 49 Cal. 18.

The same rule will apply in the absence of an antenuptial contract, as to property in this state left by a foreigner dying in this state: *In re Baubichon*, 49 Cal. 18.

Contract affecting final disposition of property may be made between husband and wife: *In re Patton*, Myr. Prob. 241.

In distributing an estate, the court has a right to consider the proper execution of a marriage contract: *In re Patton*, Myr. Prob. 241.

For the purpose of distribution, evidence of inquiries made at a place from whence supposed deceased person emigrated is not sufficient upon which to base presumption of his death: *In re Garrity*, Myr. Prob. 180.

All claims of executor against the estate must be settled before distribution: *In re Sweigert*, Myr. Prob. 152.

If there is color of title in the decedent, it should be distributed to his heirs: *In re Dunn*, Myr. Prob. 122.

Distribution of property subject to a mortgage: *In re Hinckley*, Myr. Prob. 189.

A petition for final distribution of a decedent's estate should not contain a prayer for an accounting against

one who is alleged to have come into possession of property of the estate, and who has not accounted for it: *In re Cook*, 77 Cal. 229.

Where the decree of distribution is not made upon the petition of the administrator, he is not bound to notify the court that there are other parties besides the petitioner who claim to be heirs of the decedent. That is the duty of the petitioner, but the latter is not guilty of fraud upon the court, if he claims to be the sole heir, by reason of not informing the court of the claims of other persons: *Royce v. Hampton*, 16 Nev. 25.

A distribution of common prop-

erty of a decedent should be made as follows: one half to the widow and the other half to brothers and sisters of intestate: *Clark v. Clark*, 16 Nev. 124.

Poverty and poor health is not sufficient excuse to shield a person claiming an interest in an estate from being charged with laches if he makes no effort to appear and assert his rights in a probate court having jurisdiction of the estate: *Royce v. Hampton*, 16 Nev. 25.

Property of an estate to which the title of decedent is inchoate may be distributed the same as other property of like character: *Brazee v. Schofield*, 2 Wash. Ter. 209.

Form No. 208.—Petition for Distribution.

[Caption, Form No. 1, § 5, *ante*.]

1. That petitioner was appointed administrator of the estate of —, deceased, by the order of this court duly made and entered on the — day of —, A. D. 18—, and he immediately qualified as such and entered upon the administration of said estate, and thence hitherto has continued to administer said estate;

2. That on the — day of —, A. D. 18—, petitioner caused a notice to the creditors of deceased to be published, and on the — day of —, A. D. 18—, this court made and entered its order decreeing that due and legal notice to creditors had been given herein;

3. That on the — day of —, A. D. 18—, petitioner duly made, returned, and filed in this court an inventory of all the estate of the deceased which had come to his possession or knowledge, together with an appraisement of said property;

4. That heretofore petitioner filed a final account of the administrator of said estate, which has been duly settled, allowed, and confirmed by this court;

5. That all the debts of deceased and claims against his estate, and the expenses of administration which have been incurred, and all taxes against said estate and the property thereof, are paid, and said estate is in a condition to be closed;

6. That the residue of said estate now remaining in the hands of petitioner is as follows: Cash on hand, five thousand dollars;

coach-horse and buggy, valued in the inventory at five hundred dollars; also the following described real estate: Lot No. 1 in the block bounded by H and I. and Thirtieth and Thirty-first streets, in the city of Sacramento, California, valued in the inventory at five thousand dollars; also the northeast quarter of section 10, in township 1 north, range 2 east, Mount Diablo base and meridian, in the county of Contra Costa, California, valued in the inventory at ten thousand dollars;

7. That the whole of said property is the community property of said decedent and his surviving widow;

8. That the said deceased died intestate, and his only heirs at law are his widow, —, and three minor children —, —, and —, all residents of the county of Solano, in this state;—

Wherefore petitioner prays that said residue of said estate may be distributed to those entitled thereto.

—, Attorney for Petitioner.

—, Petitioner.

§ 290. [1666.] What the Decree must Contain. —

In the order or decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.

Arizona. — Same. Rev. Stats., sec. 1249.

Idaho. — Same. Rev. Stats., sec. 5627.

Montana. — Same. Comp. Stats., p. 347, sec. 290.

Nevada. — Same; last sentence omitted. Gen. Stats., sec. 2923.

Utah. — Same as California, except that after the words "sue for," these words are interpolated, "in any court of competent jurisdiction." Comp. Laws, sec. 4262.

Washington. — Same as Nevada. Code Proc., sec. 1095.

"The decree may be made on the application of the executor or administrator, or of any person interested in the estate, and shall only be made after notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator. The court may order such further notice to be given as it may deem proper." Code Proc., sec. 1096.

"When any testator in his last will shall give any chattel or real estate to any person, and the same shall be taken in execution for the payment of the testator's debts, then all the other legatees, devisees, and heirs shall refund

their proportional part of such loss to such person, from whom the ^{loss} ~~loss~~ ^{best} shall be taken." Gen. Stats., sec. 1475.

"When any devisees, legatees, or heirs shall be required to refund any part of the estate received by them, for the purpose of making up the share, devise, or legacy of any other devisee, legatee, or heir, the superior court, upon the petition of the person entitled to contribution or distribution of such estate, may order the same to be made, and enforce such order." Gen. Stats., sec. 1476.

Wyoming.—Same as California, except that all of last sentence after "legatees" is omitted.

Legacies Draw Interest: See § 454, *post*; *Dunne v. Mastick*, 50 Cal. 246.

A decree of distribution may be set aside by the lower court, at any time within six months after its entry, upon a proper showing of mistake, inadvertence, surprise, or fraud; *De Pedrorrena v. Superior Court*, 80 Cal. 144.

A recital, in order vacating decree, that all persons interested "were duly served with due notice" of the motion to vacate is conclusive of that fact, in a proceeding to review the order on *certiorari*: *De Pedrorrena v. Superior Court*, 80 Cal. 144.

The distributees from the date of the decree of distribution have an action to recover the estate, or in proper cases its value; and when such decree is made the court loses all jurisdiction in the matter, except to compel the delivery of the property to the distributees: *Wheeler v. Bolton*, 54 Cal. 302.

Action should be brought against an administrator individually, and not in his official capacity, to recover a distributee's share in the estate of a decedent, under a decree of distribution ordering the payment of the same within a certain time, which time has elapsed without such payment; and no demand on defendant as administrator, and refusal to pay, need be alleged, the suit being a sufficient demand: *Melone v. Davis*, 67 Cal. 279; *Eustace v. Jahns*, 38 Cal. 3.

An executor cannot appeal from a judgment in favor of the claims of one set of legatees, and against others: *Bates v. Ryberg*, 40 Cal. 465; nor can he appeal from an order of distribution: *In re Marrey*, 65 Cal. 287; *Roach v. Coffey*, 73 Cal. 281; *Merrifield v. Longmire*, 66 Cal. 180; but he can probably appeal, if the amount ordered to be distributed is too large: *In re Wright*, 49 Cal. 551.

A final decree making distribution of an entire estate is, until reversed or modified on appeal, an investiture of the absolute right and title to the same in the distributees. A different disposition of a portion of the estate made pending an appeal from said final decree is void: *In re Garraud*, 36 Cal. 277.

A court of probate has no authority to set aside a decree of distribution on the ground of fraud; the remedy is in equity: *In re Hudson*, 63 Cal. 454.

After six months from the rendition of a decree of distribution, it cannot be set aside for fraud on a mere petition under section 473 of the Code of Civil Procedure, even if its provisions are applicable to decrees of the probate court. The only remedy is in equity: *Dean v. Superior Court*, 63 Cal. 473; *In re Hudson*, 64 Cal. 454.

The fact that fraud was discovered in time for plaintiffs to avail themselves of it, to oppose the order of distribution successfully, does not preclude relief in equity on the ground of fraud: *Olivas v. Olivas*, 61 Cal. 382; *In re Hudson*, 63 Cal. 454.

Annulling Will after Distribution.—Where a will is annulled after distribution, the heir may pursue the property, and perhaps its proceeds, in the hands of the distributee, but not in the hands of a *bona fide* purchaser: *Thompson v. Samson*, 64 Cal. 330.

The claim of a surviving husband of a testatrix for community property is not concluded by a decree of distribution: *In re Robland*, 74 Cal. 523.

Matter not directly adjudicated is not an estoppel to interested parties: *In re Haskell*, Myr. Prob. 204.

The share of an heir at law in an estate cannot be garnished in the hands of an executor before distribution: *In re Sine*, Myr. Prob. 100; *In re Nerae*, 35 Cal. 392.

The order of a probate court distributing an estate cannot be attacked in a collateral proceeding, except for fraud: *Ryan v. Kinney*, 2 Mont. 454.

Decree of distribution is conclusive as to the rights of heirs, legatees, or devisees only so far as they claim in such capacities, and does not create any new title. An heir may contract about or convey the title which the law has cast upon him on the death of his ancestor; and the validity or force of such contract is not affected by the fact that the court afterward, by its decree of distribution, declares his asserted heirship and title to be valid, and assumes to distribute the land to him: *Chever v. Ching Hong Poy*, 82 Cal. 68.

A decree of settlement and distribution of an estate is binding upon the administrator: *McNabb v. Wixon*, 7 Nev. 163.

The probate powers of the county court do not extend to determining what persons are entitled to realty nor to making partition of the real estate of decedent: *Hanner v. Silver*, 2 Or. 336.

Antenuptial contracts which affect the property of an estate should be proven before the probate court, and the rights of the parties determined by it, because it has jurisdiction of the distribution of estates: *Winkle v. Winkle*, 8 Or. 193.

When a decree of distribution purports to distribute undivided interests in all the property of the decedent, including the estate particularly described, and other property not known or discovered, which may have belonged to the decedent, and in which his estate may have an interest, such decree will pass title to lands of the decedent omitted from the particular description, and is not void for uncertainty of description of such lands, the general description being sufficient, upon a collateral attack, to include omitted lands which may be shown by evidence to have in fact belonged to the decedent at the time of his death; and a deed from one of the distributees conveying an undivided part of such lands will pass the fee-simple of such undivided part: *Smith v. Biscailuz*, 83 Cal. 344.

In an action to determine which of three corporations is the legatee meant in a will, an order awarding the legacy to the executors as part of the residuary fund, and determining that neither claimant is entitled thereto, is not a final distribution from which an appeal can be taken by one of the claimants: *In re Casement*, 78 Cal. 136.

In such case it is not error of which the claimant can complain, that the court improperly vacated an order previously made, by which the executors were discharged from their trust, and reinstated them and awarded the fund to them, as the claimant, not being the legatee entitled thereto, could not be affected by the orders mentioned: *In re Casement*, 78 Cal. 136.

Form No. 209. — Decree of Distribution.

[Title of Court and Estate.]

The petition of —, heretofore filed herein, praying for the distribution of the residue of the estate of —, deceased, in the hands of the administrator of said estate, among the persons entitled thereto, coming on regularly for hearing, and it appearing that due and legal notice of such hearing has been given as directed by the order of this court heretofore made and entered herein; that all claims against said estate are fully paid; that the final account of said administrator has been duly made and has been confirmed by this court; that all taxes due from said estate have been paid;

That the whole of said residue is the community property of said decedent and his surviving widow, —, who, as such survivor, is entitled to one half thereof;

That said deceased died intestate, and his only heirs at law are his said widow, —, and three minor children, —, —, and —, all residents of the county of Solano, in this state, who, as such heirs, are each entitled to one eighth of said residue;—

It is therefore ordered, adjudged, and decreed that said residue of said estate be distributed as follows, to wit, five eighths thereof to said widow, —, and one eighth thereof to each of said minor children, —, —, and —;

That the property affected by this decree is described as follows, viz.: Cash on hand, five thousand dollars; one horse and buggy, valued in the inventory at five hundred dollars; also the following described real estate, to wit (here insert particular description of realty, together with its valuation as stated in the inventory). —, Judge of the — Court.

Dated —, 18—.

§ 291. [1667.] Distribution when Decedent not Resident of State.—Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a non-resident of this state, leaving a will which has been duly proved or allowed in the state of his residence, and an authenticated copy thereof has been admitted to probate in this state, and it is necessary, in order that the estate, or any part thereof, may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state, or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court, is a full discharge of the executor or administrator with the will annexed, in this state, in relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate, ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents by order of the court.

Arizona. — Same. Rev. Stats., sec. 1250.

Idaho. — Same. Rev. Stats., sec. 5628.

Montana. — Same. Comp. Stats., p. 347, sec. 291.

Utah. — Same. Comp. Laws, sec. 4263.

Sales of Realty: See §§ 182 et seq., *ante*.

The distribution of the decedent's personal property will generally be governed by the law of his domicile at the time of his death, although each state will deal with property within its jurisdiction, so far as creditors are concerned: *In re Apple*, 66 Cal. 432.

§ 292. [1668.] Decree Made only after Notice. —

The order or decree may be made on the petition of the executor or administrator, or of any person interested in the estate. Notice of the application must be given by posting or publication, as the court may direct, and for such time as may be ordered. If partition be applied for, as provided in this chapter, the decree of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed.

Arizona. — Same. Rev. Stats., sec. 1251.

Idaho. — Same. Rev. Stats., sec. 5629.

Montana. — Same. Comp. Stats., p. 347, sec. 292.

Nevada. — First sentence same; then as follows: "And shall only be made after notice has been given or waived, and proceedings had in the manner provided in sections one hundred and fifty-two to and including one hundred and ninety-five of this act, in regard to an application for the sale of land by an executor or administrator." Last sentence same. Gen. Stats., sec. 2929.

Utah. — Same as California. Comp. Laws, sec. 4264.

Where a decree of distribution shows that proof was made to the satisfaction of the court that notice was given as required by statute, and there is nothing in the record on appeal showing to the contrary, this will be taken as conclusive: *In re Starbora*, 70 Cal. 147; *McClellan v. Downey*, 63 Cal. 520.

The statute does not require personal notice to be given of the application for final distribution; and if the complaint does not allege that the notice required by law was not given, it will be presumed

that it was given: *Daly v. Pennie*, 86 Cal. 553.

A decree of distribution will be vacated and annulled after the discharge of an administrator and his bondsmen, where it appears that no inventory or appraisement was ever made, no notices to heirs given by mailing the same in addition to publication, and the administration of the estate will be opened for regular administration. The costs in such case will be taxed against the administrator personally: *In re McFarland*, 10 Mont. 586.

Form No. 210. — Order Directing Notice of Hearing of Petition for Distribution.

[Title of Court and Estate.]

The petition of —, praying for the distribution of the property of the estate of —, deceased, having been filed

herein, it is ordered that notice of the hearing thereof be given by the clerk of this court by posting said notices in three public places in the — county of —, state of —, at least ten days before said hearing, and —, the — day of —, A. D. 18—, is hereby fixed as the time for hearing said petition. —, Judge of the — Court.

Dated —, 18—.

NOTE. — The order, instead of directing notices to be posted, may direct that they be published.

Form No. 211.—Notice of Hearing of Petition for Distribution.

[Title of Court and Estate.]

Notice is hereby given that the petition of —, the administrator of the estate of —, deceased, for a final distribution of said estate has been filed, and that the — day of —, A. D. 18—, at ten o'clock, A. M., at the court-room of said court, has been duly appointed by said court for hearing said petition, at which time any person interested in said estate may appear and file his exceptions, in writing, to said petition, and contest the same.

—, Clerk.

By —, Deputy Clerk.

§ 293. [1669.] No Distribution Ordered till all Taxes on Personal Property are Paid. — Before any decree of distribution of an estate is made, the court must be satisfied; by the oath of the executor or administrator, or otherwise, that all state, county, and municipal taxes, legally levied upon personal property of the estate, have been fully paid.

"The superior court must require every administrator or executor to pay out of the funds of the estate all taxes due from such estate; and no order or decree for the distribution of any property of any decedent among the heirs or devisees must be made until all taxes against the estate are paid." Cal. Pol. Code., sec. 3752.

Arizona. — Same, except taxes to be paid on "all property." Rev. Stats., sec. 1252.

Idaho. — Same. Rev. Stats., sec. 5630.

Montana. — Same. Comp. Stats., p. 347, sec. 293.

Utah. — Same. Comp. Laws, sec. 4265.

Wyoming. — Same. Laws 1890-91, p. 294, sec. 7.

Executor is entitled to rents and profits arising out of, and *must pay taxes* upon, property of estate devised conditionally, until the condition is complied with: *In re Broad*, Myr. Prob. 188.

Executor is entitled to be reimbursed for taxes paid by him on special devises before distribution of

such specific devise: *In re Morgan*, Myr. Prob. 80.

Executor should pay taxes on property devised specifically: *In re Morgan*, Myr. Prob. 80.

Taxes and street assessments are neither debts of the decedent nor expenses, etc., of administration: *In re Morgan*, Myr. Prob. 81.

ARTICLE III.

DISTRIBUTION AND PARTITION.

- § 294. Estate in common — Commissioners.
- § 295. Partition, and notice thereof — Petition.
- § 296. Estate in different counties, how divided.
- § 297. Partition made, although some heirs have parted with interest.
- § 298. Shares to be set out by metes and bounds.
- § 299. Whole estate may be assigned to one.
- § 300. Payments for equality of partition.
- § 301. Estate may be sold.
- § 302. Notice — Duties of commissioners.
- § 303. To make report — Partition to be recorded.
- § 304. When commissioners not necessary.
- § 305. Advancements made to heirs.

§ 294. [1675.] Estate in Common — Commissioners. — When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees, or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the court, who must be duly sworn to the faithful discharge of their duties, a certified copy of the order of their appointment, and of the order or decree assigning and distributing the estate, must be issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority, and is governed by the same rules as if three were appointed.

Arizona. — Same. Rev. Stats., sec. 1253.

Idaho. — Same. Rev. Stats., sec. 5631.

Montana. — Same. Comp. Stats., p. 347, sec. 294.

Nevada. — Same, except that it includes property held in common by the estate with other parties. Gen. Stats., sec. 2930.

Utah. — Same as California. Comp. Laws, sec. 4266.

Washington. — Same as California, to and including the word "duties"; then as follows: "And the court shall issue a warrant to them for that purpose." Code Proc., sec. 1097.

Wyoming. — Same as California, except that, after "court," "or judge" is added. Laws 1890-91, pp. 295, 296, sec. 11.

The probate powers of the county court do not extend to determining what persons are entitled to realty, nor to making partition of the real estate of decedent: *Hanner v. Silver*, 20 Or. 336.

The court never had jurisdiction to make partition of real estate, except in the course of the settlement

of the estates of deceased persons, and for the purpose of distribution to the heirs or devisees of such estates; and never had jurisdiction over the interest of any persons who might be tenants in common with the estate or its distributees, and who did not deraign their title through the estate: *Richardson v. Loupe*, 80 Cal. 490.

Form No. 212. — Order Appointing Commissioners to Make Partition of Estate.

[Title of Court and Estate.]

The petition of —, praying for the appointment of commissioners to make partition of the property of the estate of —, deceased, coming on regularly this day for hearing, and it appearing that due and legal notice thereof has been given as required by law and the order of this court, and it appearing that a decree of distribution has been made and entered herein, distributing said property in undivided shares to those entitled thereto, and that it is necessary to appoint said commissioners to make a partition thereof, —

It is ordered that —, —, and — be and they are hereby appointed commissioners to make partition of said property to those entitled thereto, in accordance with the decree of distribution heretofore entered herein. —, Judge of the — Court.

Dated —, 18—.

Form No. 213. — Oath of Commissioner.

NOTE. — The oath of office of the commissioners must be indorsed upon their commission. This commission consists of the order distributing the estate in undivided shares, and the order appointing commissioners.

The oath of office is the same as that of executor or administrator: See Form No. 52, § 70, *ante*.

§ 295. [1676.] Partition, and Notice thereof—Petition.—Such partition may be ordered and had in the superior court on the petition of any person interested. But before commissioners are appointed, or partition ordered by the court as directed in this chapter, notice thereof must be given to all persons interested, who reside in this state, or to their guardians, and to the agents, attorneys, or guardians, if any in this state, of such as reside out of the state, either personally or by public notice, as the court may direct. The petition may be filed, attorneys, guardians, and agents appointed, and notice given at any time before the order or decree of distribution, but the commissioners must not be appointed until the order or decree is made distributing the estate.

Arizona.—Same. Rev. Stats., sec. 1254.

Idaho.—Same. Rev. Stats., sec. 5632.

Montana.—Same. Comp. Stats. p. 348, sec. 295.

Nevada.—Same, with the following added: "But when the application is made solely to have partition between the estate administered upon and any other parties, such application may be made and such partition ordered at any time the court may direct." Gen. Stats., sec. 2932.

Utah.—Same as California. Comp. Laws, sec. 4267.

Washington.—First and second sentences same as corresponding sentences of California, except that the words "commissioners are appointed, or," are omitted from the second sentence. Last sentence omitted. Code Proc., sec. 1099.

"Before any partition shall be made, or any estate divided, as provided in this chapter, guardians shall be appointed for all minors and insane persons interested in the estate to be divided; and some discreet person shall be appointed to act as agent for such parties as reside out of the state, and notice of the appointment of such agent shall be given to the commissioners in their warrant; and notice shall be given to all persons interested in the partition, their guardians or agents, by the commissioners, of the time when they shall proceed to make partition." Code Proc., sec. 1106.

Wyoming.—Same as California, except that "superior" is omitted, and, after "court," "or judge" is added.

Citation: See §§ 317-321, *post*.

Notice: Cal. Code Civ. Proc., sec. 1010.

Form No. 214.—Petition for Partition.

[Caption, Form No. 1, § 5, *ante*.]

1. That heretofore letters of administration were duly issued herein to —, and he immediately entered upon his duties as administrator of the estate of —, deceased;

2. That said estate has been fully administered upon, and a decree of distribution has been entered herein;

3. That it appears by said decree, which is hereby referred to and made a part hereof, that the real estate described therein has been distributed in undivided shares to the heirs at law of said deceased, who are named in said order;

4. That petitioner is one of said heirs;—

Wherefore petitioner prays that an order of this court be made and entered appointing commissioners to segregate and assign to each one of said heirs at law his share of said real estate.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 215.—Order Directing Notice of Hearing of Petition for Partition.

[Title of Court and Estate.]

The petition of —, praying for the partition of the property of the estate of —, deceased, having been filed herein, it is ordered that —, the — day of —, A. D. 18—, be and it is hereby fixed as the time for the hearing of said petition, and it is further directed that notice of said hearing be published for at least ten days before said hearing in the —, a newspaper published in the — county of —, state of —.

Dated —, 18—. —, Judge of the — Court.

NOTE. — Notice may be directed to be given by posting, or it may be directed that personal notice be given.

§ 296. [1677.] **Estate in Different Counties, how Divided.**—If the real estate is in different counties, the court may, if deemed proper, appoint commissioners for all or different commissioners for each county. The estate in each county must be divided separately among the heirs, devisees, or legatees, as if there were no other estate to be divided, but the commissioners first appointed must, unless otherwise directed by the court, make division of such real estate, wherever situated within this state.

Arizona.—Same. Rev. Stats., sec. 1255.

Idaho.—Same. Rev. Stats., sec. 5633.

Montana.—Same. Comp. Stats., p. 348, sec. 296.

Nevada.—Same. Gen. Stats., sec. 2931.

Utah. — "If the real estate is in different counties, the court may, if deemed proper, appoint commissioners, who shall make division of such real estate, wherever situated within this territory." Comp. Laws, sec. 4268.

Washington. — Same as California. Code Proc., sec. 1098.

Wyoming. — Same as California, except that "court" is followed by "or judge." Laws 1890-91, p. 296, sec. 13.

§ 297. [678.] Partition Made, although Some Heirs have Parted with Interest. — Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees.

Arizona. — Same. Rev. Stats., sec. 1256.

Idaho. — Same. Rev. Stats., sec. 5634.

Montana. — Same. Comp. Stats., p. 348, sec. 297.

Nevada. — Same. Gen. Stats., sec. 2933.

Utah. — Same. Comp. Laws, sec. 4269.

Washington. — Same. Code Proc., sec. 1100.

Wyoming. — Same. Laws 1890-91, p. 296, sec. 14.

Assignee of heir is entitled to a distribution directly to himself, but court cannot distribute property under an assignment coupled with a defeasance: *In re Hite*, Myr. Prob. 232.

A decree of partial distribution of the estate of a decedent adjudging that all the interest of the widow in certain specified real estate has passed to her vendee, and setting apart to him her estate in the land, does not confer upon him any greater title than she possessed in law, and makes him only a tenant in common with children of the decedent omitted from the will, though the whole land was devised to the widow. The court had no power to adjudicate any other or greater title in him under his petition for distribution claiming that he had succeeded to all the interest of the devisee in the land described; and the decree, if construed to set apart to him the whole of the land, is a nullity as respects the interests of the omitted children: *In re Grider*, 81 Cal. 571.

The assignee of an heir or legatee is a stranger in the probate proceedings in an estate, and cannot have

an order distributing to him the share of his assignor: *Harrington v. La Rocque*, 13 Or. 344.

Assignee takes nothing if his assignor is one of two devisees, where the will provides that the whole estate shall go to them and to the survivor of them if his assignor dies prior to distribution: *In re Cronin*, Myr. Prob. 252.

The court has jurisdiction, under section 264 of the Probate Act (sec. 1678, Code Civ. Proc., now. — Ed.), to assign the real estate of the deceased among the alienees of the heirs or devisees in the same proportion as to such heirs or devisees: *De Castro v. Barry*, 18 Cal. 96.

Assignment by legatee of his interest in an estate as security for a debt entitles his assignee to receive in the distribution so much of the legacy as is necessary to pay the amount due upon the debt at the time of distribution: *In re Phillips*, 71 Cal. 285; *In re Hite*, Myr. Prob. 232.

Distribution of person's interest in an estate to his assignee's assignee should not be refused because of

the pendency of an action to set aside the assignment brought a few days before the date fixed for distribution, against the original assignee, in which suit no service had been made nor appearance entered: *In re Phillips*, 71 Cal. 285.

So long as the administration of an estate remains unclosed, the successor in interest of one of the distributees, who enters into possession of land under a decree of partial distribution, cannot acquire title by limitation or adverse possession as against those who are legally entitled to claim an interest in the land as tenants in common, though he claims title to the whole of the land, and pays all taxes thereon: *In re Grider*, 81 Cal. 571.

Partition between heirs or devisees, where commissioners are appointed to make division, is particularly referred to in the above section, which merely gives the right to a grantee of an heir to have the share of his grantor set off to him. The rights of a prior grantee of an heir are not

affected by a subsequent ordinary decree of distribution to the heir to which the grantee was no party. On rendering ordinary decrees of distribution, the probate court deals only with issues and parties legitimately before it: *Chever v. Ching Hong Poy*, 82 Cal. 68.

A legatee sells all his interest in an estate and receives the purchase price therefor. He does not execute a deed for the realty, but executes and delivers to the purchaser an irrevocable power of attorney to receive the property. A decree of distribution is given and made by the court distributing the property to the legatee. Such decree and power will not vest the title in the purchaser. The property may be taken in attachment by a creditor of the legatee. A deed made by the legatee to the purchaser after an attachment has been levied upon the property will not relate back to the time of sale in such a manner as to cut off the rights of the attaching creditor: *Freeman v. Rahm*, 58 Cal. 112.

§ 298. [1679.] Shares to be Set out by Metes and Bounds. — When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided.

Arizona. — Same. Rev. Stats., sec. 1257.

Idaho. — Same. Rev. Stats., sec. 5635.

Montana. — Same. Comp. Stats., p. 348, sec. 298.

Nevada. — Same. Gen. Stats., sec. 2934.

Utah. — Same. Comp. Laws, sec. 4270.

Washington. — Same. Code Proc., sec. 1101.

Wyoming. — Same. Laws 1890-91, p. 296, sec. 15.

§ 299. [1680.] Whole Estate may be Assigned to One. — When the real estate cannot be divided without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties entitled to share therein, who will accept it, always preferring the males to the females,

and among children, preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or in case of the minority of such party, then to the satisfaction of his guardian, and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the commissioners, and on making or securing the payment as before provided, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is so assigned.

Arizona. — Same. Rev. Stats., sec. 1258.

Idaho. — Same. Rev. Stats., sec. 5636.

Montana. — Same. Comp. Stats., p. 349, sec. 299.

Nevada. — Same, except that the last two sentences are omitted. Gen. Stats., sec. 2935.

Utah. — Same as California. Comp. Laws, sec. 4271.

Washington. — Same as California, to the word "always"; then as follows: "Providing the party so accepting the whole shall pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, and the true value of the estate shall be ascertained by the commissioners appointed by the court and sworn for that purpose." Code Proc., sec. 1102.

Wyoming. — Same. Laws 1890-91, pp. 296, 297, sec. 16.

Form No. 216. — Order Confirming Report of Commissioners, and Directing Sale to be Made.

[Title of Court and Estate.]

The report of —, —, and —, the commissioners heretofore appointed by this court to make partition of the property of the above-named estate, having been filed herein, and it appearing therefrom that said commissioners have performed their duties as required by law, —

It is therefore ordered that said report be and the same is hereby confirmed; and it appearing from said report that the

property of said estate cannot be divided without prejudice (or inconvenience) to the owners, and that the true value of said property as shown by said report is \$—, and that no one of the persons interested in said estate will take all of said property and pay its said value so that the money accruing therefrom may be divided among those entitled thereto, and it further appearing that in order to secure an equitable division of said property a sale thereof is necessary, —

It is further ordered that the whole of said property of said estate be sold according to law, and that before making such sale the administrator of said estate file an additional bond in the sum of — dollars. —, Judge of the — Court.

Dated —, 18—.

Form 217.—Order Confirming Report of Commissioners.

[Title of Court and Estate.]

The report of —, —, and —, the commissioners heretofore appointed by this court to make partition of the property of the above-named estate, having been filed herein, and it appearing therefrom that said commissioners have performed their duties as required by law, —

It is therefore ordered that said report be and the same is hereby confirmed.

It is further ordered that said property be distributed as follows, in pursuance of said report (here insert distribution as reported by commissioners, giving the name of the party to whom each parcel is distributed, together with a correct description of the parcel distributed to such person).

Dated —, 18—. —, Judge of the — Court.

§ 300. [1681.] Payments for Equality of Partition.—When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their

award accordingly; but such partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

Arizona. — Same. Rev. Stats., sec. 1259.

Idaho. — Same. Rev. Stats., sec. 5637.

Montana. — Same. Comp. Stats., p. 349, sec. 300.

Nevada. — Same. Gen. Stats., sec. 2936.

Utah. — Same. Comp. Laws, sec. 4272.

Washington. — Same. Code Proc., sec. 1103.

Wyoming. — Same. Laws 1890-91, p. 297, sec. 17.

§ 301. [1682.] **Estate may be Sold.** — When it appears to the court, from the commissioners' report, that it cannot otherwise be fairly divided, and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported, and confirmed in the same manner and under the same requirements provided in Article IV., Chapter VII., of this Title.

Arizona. — Same. Rev. Stats., sec. 1260.

Idaho. — Same. Rev. Stats., sec. 5638.

Montana. — Same. Comp. Stats., p. 349, sec. 301.

Nevada. — Same. Gen. Stats., sec. 2937.

"When partition of real estate among heirs or devisees shall be required, and such real estate shall be in common and undivided with the real estate of any other person, the commissioners shall first divide and sever the estate of the deceased from the estate in which it lies in common, and such division so made and established by the probate court shall be binding upon all the persons interested. Upon application by petition of the heirs or creditors, or any of them, the probate court may authorize the executor or administrator to bring suit for such partition in the district court. Such suit may also be brought by the executor, when so authorized by the will." Gen. Stats., sec. 2938.

Utah. — Same as California. Comp. Laws, sec. 4273.

Washington. — "When it cannot be otherwise fairly divided, the whole or any part of the estate, real or personal, may be recommended by the commissioners to be sold; and if the report be confirmed, the court may order a sale by the executor or administrator, and distribute the proceeds." Code Proc., sec. 1104.

"When partition of real estate among heirs or devisees shall be required, and such real estate shall be undivided and in common with the real estate of any other person, the commissioners shall first divide and sever the estate of the deceased from the estate with which it lies in common; and such division so made and established by the court shall be binding upon all the persons interested." Code Proc., sec. 1105.

§ 302. [1683.] Notice—Duties of Commissioners.

Before any partition is made or any estate divided, as provided in this chapter, notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition. The commissioners may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judgment upon the matters before them.

Arizona. — Same. Rev. Stats., sec. 1261.

Idaho. — Same. Rev. Stats., sec. 5639.

Montana. — Same. Comp. Stats., p. 350, sec. 302.

Nevada. — Same. Gen. Stats., sec. 2939.

Utah. — Same. Comp. Laws, sec. 4274.

Washington. — See Code Proc., sec. 1106, under § 295, *ante*.

Wyoming. — Same as California; last sentence omitted. Laws 1890-91, p. 297, sec. 18.

Notice: See §§ 317-321, *post*; Cal. Code Civ. Proc., sec. 1010.

Form No. 218. — Notice to Appear before Commissioners in Partition.

[Title of Court and Estate.]

To — (here insert the names of all parties interested in the estate, including the executor or administrator).

You are hereby notified that the undersigned commissioners, heretofore appointed to make partition of the above-entitled estate, will meet at the office of —, No. 410 Capitol Avenue, Sacramento, California, at — o'clock, — m., on the — day of —, A. D. 18—, to make said partition, at which time you may produce any testimony relevant to such matter.

— }
— } Commissioners.
— }

Dated —, 18—.

§ 303. [1684.] To Make Report — Partition to be Recorded. — The commissioners must report their proceedings, and the partition agreed upon by them, to the court, in writing, and the court may, for sufficient reasons, set aside the report and commit the same to the same commissioners, or ap-

point others; and when such report is finally confirmed, a certified copy of the judgment, or decree of partition made thereon, attested by the clerk under the seal of the court, must be recorded, in the office of the recorder of the county where the lands lie.

Arizona. — Same. Rev. Stats., sec. 1262.

Idaho. — Same. Rev. Stats., sec. 5640.

Montana. — Same. Comp. Stats., p. 350, sec. 303.

Nevada. — Same. Gen. Stats., sec. 2940.

Utah. — Same. Comp. Laws, sec. 4275.

Washington. — Same. Code Proc., sec. 1107.

Wyoming. — Same, except that "judge" may also act. Laws 1890-91, p. 297, sec. 19.

Form No. 219. — Report of Commissioners.

[Title of Court and Estate.]

To the honorable — court of the — county of —, state of —.

The undersigned, heretofore appointed by this court to make partition of the estate of —, deceased, in pursuance of an order of distribution heretofore made and entered herein (a certified copy of which said order of distribution and order appointing said commissioners was duly issued to us as our commission to act as such commissioners, and is annexed hereto), respectfully make the following report:—

1. That in pursuance of law, our oath of office as such commissioners was indorsed upon our said commission, and was subscribed by each of us, and we each took said oath of office before an officer authorized to administer oaths and certify thereto, and said oath has been properly certified by said officer, all of which will fully appear by reference to said commission above referred to;

2. That they gave due and legal notice of the time when and place where they would make said partition of said property of said estate to all persons interested therein;

3. That in pursuance of said notice, and at the time and place mentioned therein, to wit, at —, said commissioners met, all being present, and proceeded to hear the allegations and proofs of the said interested parties, and to make partition of the property of the estate of said —, deceased, situated in the said county of —, state of —;

4. That after hearing said proofs and allegations, and after viewing the said property, said commissioners find a partition thereof cannot be had without prejudice and inconvenience to the owners thereof;

5. That the true value of said property is as follows (here insert a list of property, correctly describing it, and state the value of each parcel separately);

6. That we recommend that the whole of said property be assigned to —, one of said interested parties, who elects to take the same and pay the value thereof.

Dated —, 18—.

— }
— } Commissioners.
— }

Form No. 220. — Report of Commissioners.

[Title of Court and Estate.]

(Follow Form No. 219, *ante*, to subdivision 4, and then as follows:)

4. That after hearing said proofs and allegations, and after viewing the said property, said commissioners made partition thereof as follows:—

They assigned to — the following described property, to wit (here insert particular description);

They assigned to —, etc.

All of which is respectfully submitted.

Dated —, 18—.

— }
— } Commissioners.
— }

(Or as follows:)

5. That after hearing — as follows:—

They assigned to William Jones the following described property, to wit (here insert particular description), together with the sum of one hundred dollars, to be paid by Hank Jones, to whom the next assignment is made;

They assigned to Hank Jones the following described property, to wit (here insert particular description), provided, however, that said Hank Jones pay to said William Jones, above named, the sum of one hundred dollars, in order to equalize

the difference in value between the two pieces of property assigned to each respectively;

Etc.

All of which is respectfully submitted.

— }
— } Commissioners.
— }

Dated —, 18—.

§ 304. [1685.] When Commissioners not Necessary. — When the court makes a judgment or decree assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is decreed, or some of them, request that such partition be made.

Arizona. — Same. Rev. Stats., sec. 1263.

Idaho. — Same. Rev. Stats., sec. 5641.

Montana. — Same. Comp. Stats., p. 350, sec. 304.

Nevada. — Same. Gen. Stats., sec. 2941.

Utah. — Same. Comp. Laws, sec. 4276.

Washington. — Same. Code Proc., sec. 1108.

Wyoming. — Same. Laws 1890-91, p. 297, sec. 20.

§ 305. [1686.] Advancements Made to Heirs. — All questions as to advancements made, or alleged to have been made, by the decedent to his heirs may be heard and determined by the court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the court, or in case of appeal, of the supreme court, is binding on all parties interested in the estate.

Arizona. — Same. Rev. Stats., sec. 1264.

Idaho. — Same. Rev. Stats., sec. 5642.

Montana. — Same. Comp. Stats., p. 350, sec. 305.

Nevada. — Same. Gen. Stats., sec. 2942.

Utah. — Same, except that "district" is substituted for "supreme." Comp. Laws, sec. 4277.

Washington. — Same as California. Code Proc., sec. 1109.

Wyoming. — Same as California. Laws 1890-91, p. 298, sec. 21.

ARTICLE IV.

AGENTS FOR ABSENT INTERESTED PARTIES — DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

- § 306. Court may appoint agent for absentees.
- § 307. Agent to give bond, and his compensation.
- § 308. Unclaimed estate, how disposed of.
- § 309. When real and personal property to be sold.
- § 310. Liability of agent on his bond.
- § 311. Certificate to claimant.
- § 312. Final settlement, decree, and discharge.
- § 313. Discovery of property.

§ 306. [1691.] Court may Appoint Agent for Absentees. — When any estate is assigned or distributed by a judgment or decree of the court, as provided in this chapter, to any person residing out of and having no agent in this state, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate as well as to act for such absent person in the distribution.

Arizona. — Same. Rev. Stats., sec. 1270.

Idaho. — Same. Rev. Stats., sec. 5643.

Montana. — Same. Comp. Stats., p. 350, sec. 306.

Nevada. — Same. Gen. Stats., sec. 2943.

Utah. — Same. Comp. Laws, sec. 4278.

Washington. — Same. Code Proc., sec. 1110.

Wyoming. — Same. Laws 1890-91, p. 298, sec. 22.

See Cal. Pol. Code, sec. 437, under § 485, *post*.

Form No. 221. — Order Appointing Agent to Take Possession for Absent Distributees.

[Title of Court and Estate.]

Whereas a decree of distribution has been duly given, made, and entered herein, and by the terms thereof the following described property has been distributed to one —, to wit, one bay gelding, one roan stallion, and the following described real estate, to wit (here insert description); and whereas said — does not reside in this state, and does not have an agent therein authorized to receive said property; and whereas it is necessary that an agent be appointed to take possession and charge of

said property for the benefit of said —, and it appearing that said property is of the value of about \$—; —

It is therefore ordered that — be and he is hereby appointed such agent, and he is hereby authorized to take possession and charge of said property and dispose of it according to law.

Dated —, 18—. —, Judge of the — Court.

§ 307. [1692.] Agent to Give Bonds — Compensation. — The agent must execute a bond to the state of California, to be approved by the court, or a judge thereof, conditioned that he shall faithfully manage and account for the estate. The court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses.

Arizona. — Same. Rev. Stats., sec. 1271.

Idaho. — Same. Rev. Stats., sec. 5644.

Montana. — Same. Comp. Stats., p. 355, sec. 307.

Nevada. — Same. Gen. Stats., sec. 2944.

Utah. — Same. Comp. Laws, sec. 4279.

Washington. — Same. Code Proc., sec. 1111.

Wyoming. — Same. Laws 1890-91, p. 298, sec. 23.

Form No. 222. — Bond of Agent Appointed to Take Possession for Absent Distributees.

[Title of Court and Estate.]

Know all men by these presents, that we, — as principal, and — and — as sureties, are held and firmly bound to the state of — in the penal sum of — dollars, lawful money of the United States, to be paid to the said state of —, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed and sealed this — day of —, A. D. 18—.

The condition of the above obligation is such, that whereas by an order duly made and entered by the — court of the — county of —, state of —, the above-named principal was appointed agent to receive and take charge of the distributive share of —, one of the heirs at law of —, deceased, and hold the same subject to her order and to dispose of the same according to law, —

Now, therefore; if the said principal shall well and faithfully

perform the duties of his said trust, then this obligation to be void and of no effect, otherwise to remain in full force and virtue.

—— [SEAL]
 —— [SEAL]
 —— [SEAL]

(Justification as in Form No. 53, § 71, *ante*.)

§ 308. [1693.] Unclaimed Estate, how Disposed of.—When personal property remains in the hands of the agent unclaimed for a year, and it appears to the court that it is for the benefit of those interested, it shall be sold under the order of the court, and the proceeds, after deducting the expenses of the sale allowed by the court, must be paid into the state treasury. When the payment is made, the agent must take from the treasury duplicate receipts, one of which he must file in the office of the controller, and the other in the court.

Arizona.—Same. Rev. Stats., sec. 1272.

Idaho.—Same. Rev. Stats., sec. 5645.

Montana.—Same. Comp. Stats., p. 351, sec. 308.

Nevada.—Same, except that “the estate” is substituted for “personal property”; “territorial auditor” is substituted for “controller”; and the following is omitted: “And it appears to the court that it is for the benefit of those interested.” Gen. Stats., sec. 2945.

Utah.—Same as California, to the word “state”; then as follows: “County treasury of the county wherein administration is had. When the payment is made, the agent must take from the treasurer duplicate receipts, one of which he must file in the office of the county clerk of such county.” Comp. Laws, sec. 4280.

Washington.—Same as California. Code Proc., sec. 1112.

Wyoming.—Same as California. Laws 1890-91, p. 298, sec. 24.

Unclaimed Property.—The court cannot direct the portion of an estate allotted to a non-resident heir to be distributed among the other heirs, if the non-resident heir fails to appear and claim it within a year. The money should be paid into the state treasury: *Pyatt v. Brockman*, 6 Cal. 418; and see also §§ 488-491, *post*.

Form No. 223.—Petition for Sale of Personal Property in the Possession of Agent for Absent Distributees.

[Title of Court and Estate.]

—— respectfully shows to the court that on the —— day of ——, A. D. 18——, by the order of this court duly made and entered, he was appointed agent for ——, and was authorized by such order to take possession and charge of certain personal

property, to wit, one bay gelding and one roan stallion; that thereupon he immediately qualified as such agent and is now the duly qualified and acting agent of said — for the purposes aforesaid;

That said property has remained in the hands of petitioner as such agent for more than one year last past and has not been claimed;

That said property is of such a character that it is a source of constant expense, and that the earnings of said property is much less than such expense;

That said property is constantly deteriorating in value, and it is for the benefit of those interested that it should be sold;—

Wherefore petitioner prays that said property be ordered sold in such manner as to the court may seem proper.

—, Attorney for Petitioner.

—, Petitioner.

Form No. 224. — Order of Sale of Personal Property in the Possession of Agent for Absent Distributees.

[Title of Court and Estate.]

The petition of — for an order of sale of the personal property remaining in his hands as agent for — coming on for hearing this day, and it appearing to the satisfaction of the court that said property has remained in the hands of said petitioner for more than a year last past, and has not been claimed, and that it is for the benefit of those interested that it should be sold,—

It is therefore ordered that said personal property, consisting of one bay gelding and one roan stallion, be sold by said agent at public auction, after such notice and in such manner as is provided by law for the sale of personalty by executors and administrators.

—, Judge of the — Court.

Dated —, 18—.

Form No. 225. — Receipt of State Treasurer to Agent for Absent Distributees.

[Title of Court and Estate.]

Received of —, the duly appointed, qualified, and acting agent of —, one of the distributees of the estate of —, de-

ceased, the sum of \$——, the same being her distributive share of said estate and the proceeds of the sale thereof heretofore made under the order of the superior court of the —— county of ——, state of ——.

——, State Treasurer.

Dated ——, 18—.

§ 309. [1694.] When Real and Personal Property to be Sold.—The agent must render the court appointing him, annually, an account, showing:—

1. The value and character of the property received by him, what portion thereof is still on hand, what sold, and for what;

2. The income derived therefrom;

3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid;

4. Expenses incurred in the care, protection, and management thereof, and whether paid or unpaid. When filed, the court may examine witnesses and take proofs in regard to the account; and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court may, by order, direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper, and the purchase-money to be deposited in the state treasury.

Arizona.—Same. Rev. Stats., sec. 1273.

Idaho.—Same. Rev. Stats., sec. 5646.

Montana.—Same. Comp. Stats., p. 351, sec. 309.

Utah.—Same, except that “county” is substituted for “state.” Comp. Laws, sec. 4281.

Wyoming.—Same. Laws 1890-91, p. 298, sec. 25.

Form No. 226. — Account of Agent for Absent Distributees.

[Title of Court and Estate.]

(This account does not differ from an ordinary mercantile account, and for form of report and oath to accompany this account, see form of report and oath accompanying annual or final account of administrator.)

Form No. 227. — Order of Sale of Property upon the Settlement of Annual Account of Agent for Absent Distributees.

[Title of Court and Estate.]

—, the agent of —, heretofore appointed by the order of the court herein, having filed his annual account and a report of his proceedings as such agent as provided by law, and the court having examined witnesses and taken proofs in regard to said account, and the court being satisfied from such account and proofs that it will be for the best interest, benefit, and advantage of the persons interested that the whole of the property in the hands of such agent should be sold,—

It is therefore ordered that said account be and the same is hereby allowed, confirmed, and approved, and it is further ordered that the whole of the property in the hands of said —, as such agent, be sold by him at public auction, after such notice and in such manner as is provided by law for the sale of real (personal) property by executors and administrators, and that said agent report his proceedings under this order to this court; the property affected by this order is described as follows, to wit, one bay gelding and one roan stallion, and the following described real estate, to wit, lot No. 1, in the block between J and K and Twentieth and Twenty-first streets, in the city of —, county of —, state of —.

—, Judge of the — Court.

Dated —, 18—.

Form No. 228. — Order Confirming Sale of Property by Agent for Absent Distributees.

[Title of Court and Estate.]

(For form of this order, see Forms Nos. 149, 150, which will apply, with slight changes in the recitals.)

§ 310. [1695.] Liability of Agent on his Bond.
—The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested.

Arizona. — Same. Rev. Stats., sec. 1274.

Idaho. — Same. Rev. Stats., sec. 5647.

Montana. — Same. Comp. Stats., p. 351, sec. 310.

Nevada. — Same. Gen. Stats., sec. 2946.

Utah. — Same. Comp. Laws, sec. 4282.

Washington. — Same. Code Proc., sec. 1113.

Wyoming. — Same, with this added: "Or such suit may be ordered by the court." Laws 1890-91, p. 299, sec. 26.

§ 311. [1696.] **Certificate to Claimant.** — When any person appears and claims the money paid into the treasury, the court making the distribution must inquire into such claim, and being first satisfied of his right thereto, must grant him a certificate to that effect, under its seal; and upon the presentation of the certificate to him, the controller must draw his warrant on the treasurer for the amount.

Arizona. — Same. Rev. Stats., sec. 1275.

Idaho. — Same. Rev. Stats., sec. 5648.

Montana. — Same. Comp. Stats., p. 351, sec. 311.

Nevada. — Same, except that "territorial auditor" is substituted for "controller." Gen. Stats., sec. 2947.

Utah. — Same as California, except that "county clerk" is substituted for "controller." Comp. Laws, sec. 4283.

Washington. — "When any person shall appear and claim the money paid into the treasury, the court making the distribution, being first satisfied of his right, shall order the payment of such money, and upon the presentation of a certified copy of the order to the county auditor, he shall draw his warrant on the county treasurer for the amount." Code Proc., sec. 1114.

Wyoming. — Same as California, except that "auditor" is substituted for "controller," and this is added: "And the treasurer must pay the same." Laws 1890-91, p. 299, sec. 27.

Form No. 229. — Petition of Claimant for Certificate that He is Entitled to Money Deposited in the State Treasury by Agent.

[Title of Court and Estate.]

The petition of — respectfully shows: —

That she is one of the heirs at law of —, deceased; that on the — day of —, A. D. 18—, in the matter of said estate, this court made and entered its decree, distributing to petitioner certain property of said estate, to wit, one bay gelding, one roan stallion, and the following described real estate (here insert description); that at the date of said decree, peti-

tioner was not a resident of this state, but resided in the state of —; that in pursuance of law, this court appointed one — an agent to take possession of said property for petitioner, and that such proceedings were had herein that on the — day of —, A. D. 18—, said agent, acting under the order of this court, deposited the proceeds of a sale of said property in the state treasury of this state; that petitioner is the identical person mentioned as — in said decree, and in all proceedings herein subsequent thereto, and is entitled to said proceeds so deposited; —

Wherefore petitioner prays that a certificate be granted to him, showing that he is entitled to receive from the state treasury the proceeds of said property. —, Petitioner.

—, Attorney for Petitioner.

Form No. 230. — Certificate of Judge Entitling Claimant to Money in State Treasury.

[Title of Court and Estate.]

It appearing from the petition of —, heretofore filed herein, that she is the identical person mentioned in the proceedings herein by the name of —; that said — is one of the distributees of the estate of —, deceased, and that the funds representing her share of the said estate have been deposited in the treasury of this state by due and legal proceedings herein, and the court being fully satisfied of her right to such funds;—

It is therefore ordered and certified that said — is entitled to withdraw said funds, amounting to \$—, from the state treasury of this state, and the — is hereby authorized and directed to draw his warrant therefor in favor of said —.

Dated —, 18—. —, Judge of the — Court.

[SEAL]

Attest: —, Clerk.

§ 312. [1697.] Final Settlement, Decree, and Discharge. — When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court, all the property of the estate to the parties entitled,

and performed all the acts lawfully required of him, the court must make a judgment or decree, discharging him from all liability to be incurred thereafter.

Arizona.—Same. Rev. Stats., sec. 1276.

Idaho.—Same. Rev. Stats., sec. 5649.

Montana.—Same. Comp. Stats., p. 351, sec. 312.

Nevada.—Same. Gen. Stats., sec. 2948.

Utah.—Same. Comp. Laws, sec. 4284.

Washington.—Same. Code Proc., sec. 1115.

Wyoming.—Same. Laws 1890-91, p. 294, sec. 81.

The superior court sitting as a probate court has, independently of statute, full power to set aside and annul a decree of final discharge of the administrator of a decedent's estate, where made and entered inadvertently; and having jurisdiction to do so, error, if committed, cannot be corrected on a writ of prohibition: *Wiggin v. Superior Court*, 68 Cal. 398.

Relief against decree of discharge cannot be had on motion after six months from its rendition; the remedies left are by appeal and in equity: *Dean v. Superior Court*, 63 Cal. 473.

The allowance of a final account is not a discharge of the executor or administrator from his trust, nor is it a decree of distribution or its

equivalent. Until the entry of a decree discharging him from his liability, he is not discharged from his trust: *McCrea v. Haraszthy*, 51 Cal. 146; *Dohs v. Dohs*, 60 Cal. 255; *Dean Superior Court*, 63 Cal. 473.

The settlement of the account and the discharge of an administrator is a bar to an action against him by his successor for neglect to bring suit for land in possession of adverse claimants, by reason of which the land was lost to the estate: *Reynolds v. Brumagin*, 54 Cal. 254; *Grady v. Porter*, 53 Cal. 680.

When an administrator has been discharged, he has no longer any authority to appear for or bind the estate in any manner: *Willis v. Farley*, 24 Cal. 490.

Form No. 231.—Receipt on Distribution.

[Title of Court and Estate.]

Received of —, administrator of the estate of —, deceased, the sum of \$— (and if any other property, insert description here), being in full of my distributive share of said estate.

—, Heir at Law (devisee or legatee) of —, Deceased.

Dated —, 18—.

Form No. 232.—Petition for Final Discharge.

[Title of Court and Estate.]

Now comes —, administrator (executor) of the estate of —, deceased, and shows to this court:—

That he has paid all sums of money due from him, and has delivered up, under the order of this court, all the property of

the said estate to the parties entitled thereto, and that he has performed all the acts required of him by law, that said estate has been fully administered, and that he has filed vouchers, as provided by law, in this court,—

Wherefore petitioner prays that he be discharged from the further administration of said estate. —, Petitioner.

—, Attorney for Petitioner.

Form No. 233. — Decree of Final Discharge.

[Title of Court and Estate.]

The petition of —, the administrator of the estate of —, deceased, coming on regularly for hearing, and it appearing that said estate has been fully administered, and that said administrator has paid all sums of money due from him, and has delivered up all property of said estate to the parties entitled thereto, in pursuance of the orders and decrees of this court, and has filed herein satisfactory vouchers thereof,—

It is ordered, adjudged, and decreed that said administrator be and he is hereby discharged from further administering said estate, and his sureties are released from any liability to be hereafter incurred. —, Judge of the — Court.

Dated —, 18—.

§ 313. [1698.] Discovery of Property.—The final settlement of an estate, as in this chapter provided, shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate be discovered, or if it become necessary or proper for any cause that letters should be again issued.

Arizona. — Same. Rev. Stats., sec. 1277.

Idaho. — Same. Rev. Stats., sec. 5650.

Montana. — Same. Comp. Stats., p. 352, sec. 313.

Nevada. — Same. Genl. Stats., sec. 2949.

Utah. — Same. Comp. Laws, sec. 4285.

Washington. — Same. Code Proc., sec. 1116.

Wyoming. — Same. Laws 1890-91, p. 294, sec. 9.

ARTICLE V.

SETTLEMENT OF ACCOUNTS OF TRUSTEES AFTER DISTRIBUTION OF ESTATES AND
THEIR COMPENSATION, ETC.

§ 313 a. Jurisdiction after distribution.

§ 313 b. Compensation of trustees.

§ 313 c. Appeal — Decree, when conclusive.

• **§ 313 a. [1699.] Jurisdiction after Distribution. —**
Where any trust has been created by or under any will to continue after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust. And any trustee created by any will, or appointed to execute any trust created by any will, may, from time to time, pending the execution of his trust, or may at the termination thereof, render and pay for the settlement of his accounts as such trustee, before the superior court in which the will was probated, and in the manner provided for the settlement of the accounts of executors and administrators. The trustee, or in the case of his death, his legal representatives, shall for that purpose present to the court his petition setting forth his accounts in detail; and upon the filing thereof the court or judge shall fix a day for the hearing, and a citation shall be issued, citing all the beneficiaries of the said trust to appear and show cause why the account should not be allowed; such citation shall be personally served upon all the beneficiaries in the state, in the manner provided for the service of summons in civil actions, and shall be served upon all the beneficiaries, who shall appear by affidavit to be absent from the state, by publication in such manner as the court or judge may order, for not less than two months. And any such trustee may, in the discretion of the court, upon application of any beneficiary of the trust, be ordered to appear and render his account, after being cited by service of citation as provided for the service of summons in civil cases. Upon the filing of the account so ordered, the same proceedings for the hearing and settlement thereof shall be had as are hereinabove provided.

Corporation may be Trustees: See § 76, *ante*.

Where a testator provided in his will that his wife should manage his estate as trustee, and that in case of her death before certain grandchildren, named as trustees, should become of age, the management of the property should devolve upon his son, named in the will, and the widow voluntarily renounces her trust, and con-

sent to the substitution of the son as trustee, the order of substitution is not void for want of notice to the minor trustees, who were not beneficiaries under the will, or interested in the management of the property during the life of the widow: *Moore v. Superior Court*, 86 Cal. 495.

§ 313 b. [1700.] Compensation of Trustees.—On all such accountings the court shall allow the trustee or trustees the proper expenses and such compensation for services as the court may adjudge to be just and reasonable, and shall apportion such compensation among the trustees according to the services rendered by them respectively, and may, in its discretion, fix a yearly compensation for the trustee or trustees, to continue as long as the court may judge proper.

“Except as provided in section 1700 of the Code of Civil Procedure [§ 313 b, *supra*], when a declaration of trust is silent upon the subject of compensation, the trustee is entitled to the same compensation as an executor. If it specifies the amount of his compensation, he is entitled to the amount thus specified, and no more. If it directs that he shall be allowed a compensation, but does not specify the rate or amount, he is entitled to such compensation as may be reasonable under the circumstances.” Cal. Civ. Code, sec. 2274.

§ 313 c. [1701.] Appeal—Decree, when Conclusive.—From a decree settling such account appeal may be taken in the manner provided for an appeal from a decree settling the account of an executor or administrator. The decree of the superior court, if affirmed on appeal, or becoming final without appeal, shall be conclusive. This act shall take effect immediately, and shall apply to all estates of decedents, where a final decree of distribution has not heretofore been made.

CHAPTER XII.

OF ORDERS, DECREES, PROCESS, MINUTES, RECORDS, TRIALS,
APPEALS, AND PROCEEDINGS TO TERMINATE LIFE ESTATE.

- § 314. Orders and decrees to be entered in minutes.
- § 315. How publication made.
- § 316. Recorded decree or order is notice from date of filing.
- § 317. Citation, how directed, and what to contain.
- § 318. Citation, how issued.
- § 319. Citation, how served.
- § 320. Personal notice given by citation.
- § 321. Citation to be served five days before return.
- § 322. When description of realty need not be published.
- § 323. Rules of practice, generally.
- § 324. New trials and appeals.
- § 325. Within what time appeal must be taken.
- § 326. Issues joined, how tried and disposed of.
- § 327. Court to try case when — Issues for jury trial.
- § 328. Attorney for minor heirs, etc. — Compensation.
- § 329. Decree relative to homestead, and effect thereof.
- § 330. Costs, by whom paid in certain cases.
- § 331. Executor, etc., removed for contempt.
- § 332. Process may be served on guardian.
- § 333. Life estate, proceedings to terminate.

§ 314. [1704.] Orders and Decrees to be Entered in Minutes.—Orders and decrees made by the court, or a judge thereof, in probate proceedings, need not recite the existence of facts, or the performance of acts, upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this title. All orders and decrees of the court or judge must be entered at length in the minute-book of the court.

Arizona. — Same, with the following added: “And upon the close of each term the judge must sign the minutes.” Rev. Stats., sec. 1278.

Idaho. — Same as Arizona, except that the first sentence is omitted. Rev. Stats., sec. 5655.

Montana. — Same as Arizona. Comp. Stats., p. 353, sec. 314.

Nevada. — Same as Idaho. Gen. Stats., sec. 2956.

Utah. — Same as California. Comp. Laws, sec. 4286.

Wyoming. — Same as California. Laws 1890-91, p. 301, sec. 1.

On an appeal from an order refusing to change the record so as to show that a decree was in fact entered at a later date than appears from its face, where the affidavit of appellant's attorney and the clerk, as to the time of entering the decree, are directly in conflict, the conclusions of fact by the court below will not be disturbed: *In re Fisher*, 75 Cal. 523.

There is no uniformity in the manner in which the different judges sign or attest orders and proceedings in the settlement of the estates of deceased persons. Sometimes they use their simple signatures without any designation of their official character, and sometimes they add the designation "county judge," and sometimes "probate judge," and it has never been held or supposed that the validity of the orders or proceedings was in any respect affected by the absence of the official designation from the signature, or the presence of the designation "county judge" instead of "probate judge": *Touchard v. Crow*, 20 Cal. 153.

Presumption does not arise in

favor of the regularity of order of court, where it is made in a matter over which the court has no jurisdiction: *Territory v. Mix*, 1 Ariz. 52.

Order reciting the existence of jurisdictional facts is not conclusive when the record affirmatively shows that such facts do not exist, even though the judgments of the court have the same force and effect as courts of general jurisdiction: *In re Charlebois*, 6 Mont. 373.

Where an order is lost from the files, and is not recorded in the minutes of the court, by reason of the carelessness of the clerk, an administrator who has paid out money under it is protected, and proof of such order may be made *dehors* the record: *In re Millenovich*, 5 Nev. 161.

A probate court may correct its own errors, either as to matters of law or of fact, at any time before final settlement; provided, such corrections can be made from the record without opening the proof in the case: *Lucich v. Medin*, 3 Nev. 93. See also *In re Millenovich*, 5 Nev. 163.

§ 315. [1705.] How Publication Made. — When any publication is ordered, such publication must be made daily, or otherwise, as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title. The court, or a judge thereof, may, however, order a less number of publications during the period.

Arizona. — Same. Rev. Stats., sec. 1279.

"Whenever proof of notice shall be required by the provisions of this act, the certificate of the probate judge that such notice has been duly given shall be deemed sufficient proof." Rev. Stats., sec. 1295.

Idaho. — Same as California. Rev. Stats., sec. 5656.

Montana. — Same as California. Comp. Stats., p. 353, sec. 315.

Nevada. — Same as California. Gen. Stats., sec. 2956.

Utah. — Same as California. Comp. Laws, sec. 4287.

Proof of Publication: See Cal. Code Civ. Proc., secs. 2010, 2011.

This section applies where the publication is directed by statute to be made: *In re Cunningham*, 73 Cal. 553.

Form No. 234. — Affidavit of Publication.

[Title of Court and Estate,]

State of —, }
 — County of —. } ss.

—, being first duly sworn, upon his oath says that he is the proprietor of the —, a daily (or weekly) newspaper of general circulation printed and published in the — county of —, state of —; that a true copy of the attached printed matter (which is made a part of this affidavit), which is a —, has been published in said paper daily (or on Wednesday of each week), commencing on the — day of —, 18—, and to and including the — day of —, 18—, in pursuance of the order of court herein.

Subscribed and sworn to before me this — day of —, 18—.

§ 316. [1706.] **Decree, etc., to be Recorded.**—When it is provided in this title that any order or decree of the court, or a judge thereof, or a copy thereof, must be recorded in the office of the county recorder, from the time of filing the same for record, notice is imparted to all persons of the contents thereof.

Arizona.—Same. Rev. Stats., sec. 1280.

Idaho.—Same. Rev. Stats., sec. 5657.

Montana.—Same. Comp. Stats., p. 353, sec. 316.

Utah.—Same. Comp. Laws, sec. 4288.

Wyoming.—Same, except that "county clerk" is inserted in place of "county recorder." Laws 1890-91, p. 301, sec. 2.

§ 317. [1707.] **Citation, how Directed, and What to Contain.**—Citations must be directed to the person to be cited, signed by the clerk, and issued under the seal of the court, and must contain:—

1. The title of the proceeding;
2. A brief statement of the nature of the proceeding;
3. A direction that the person cited appear at a time and place specified.

Arizona.—Same. Rev. Stats., sec. 1281.

Idaho.—Same. Rev. Stats., sec. 5658.

Montana.—Same. Comp. Stats., p. 353, sec. 317.

Nevada. — Same, except that the citation may be directed to the sheriff of the proper county, and must require him to cite the party to appear before the court or judge, as the case may be, at a time and place to be named in the citation; or the citation may be addressed directly to the person to be cited. Gen. Stats., sec. 2957.

Utah. — Same as California. Comp. Laws, sec. 4239.

Washington. — Same as Nevada, except that the provision relating to the citation being addressed directly to the person cited is omitted. Code Proc., sec. 848.

Wyoming. — Same as California. Laws 1890-91, p. 301, sec. 3.

An order of the probate court, adjudging the amount due by a guardian upon an accounting instituted by the ward, *is not binding* upon the sureties on the guardian's bond *unless notice of the proceedings was given to the guardian*, in conformity to sections 1707 (*supra*) et seq. of the California Code of Civil Procedure. The mere service on him of an order of the court directing him to file an account is not sufficient. Under section 1709 (§ 319, *post*) of said code, the citation is to be served in the same manner as a summons in a civil action; therefore, if the guardian has left the state, the citation should be served on him by publication, and such service by publication is

sufficient to give the court jurisdiction to bind the guardian by its order made upon a settlement of the account: *Spencer v. Houghton*, 68 Cal. 82.

Notice will be presumed to have been properly given where order admitting will to probate recites "that notice has been given of the time appointed for proving said will and for hearing said petition, and that citations have been duly issued and served, as required by the previous order of this court, and it appearing to this court that notice has been given according to law to all parties interested," if there is an entire absence of other record evidence: *Moore v. Earl*, 91 Cal. 635.

Form No. 235. — Citation.

[Title of Court and Estate.]

The people of the state of — to —, —, and —, greeting.

By order of this court, you, said —, —, and —, are hereby cited to appear before the — court (or before Hon. —, judge of the — court) of the county of —, state of —, at the court-house, on the — day of —, 18—, at — o'clock, — M., of that day (state briefly the purpose for which the presence of the persons cited is required).

In testimony whereof, I, —, clerk of the — court aforesaid, do hereunto set my hand and affix the seal of said court, at office in the city of —, this — day of — A. D. 18—.

[SEAL]

—, Clerk.

By —, Deputy Clerk.

§ 318. [1708.] Citation, how Issued. — The citation may be issued by the clerk upon the application of any party,

without an order of the judge, except in cases in which such order is by the provisions of this title expressly required.

Arizona. — Same. Rev. Stats., sec. 1282.

Idaho. — Same. Rev. Stats., sec. 5659.

Montana. — Same. Comp. Stats., p. 353, sec. 318.

Nevada. — Same. Gen. Stats., sec. 2960.

Utah. — Same. Comp. Laws, sec. 4290.

Wyoming. — Same, except that after "judge," "or commissioner" is added. Laws 1890-91, p. 302, sec. 4.

See *Spencer v. Houghton*, 68 Cal. 82.

§ 319. [1709.] Citation, how Served. — The citation must be served in the same manner as a summons in a civil action.

Arizona. — Same. Rev. Stats., sec. 1283.

Idaho. — Same. Rev. Stats., sec. 5660.

Montana. — Same. Comp. Stats., p. 353, sec. 319.

Nevada. — Same. Gen. Stats., sec. 2957.

"The officer to whom the citation is directed shall serve it by delivering a copy to the person therein named, or to each of them if there be more than one, and shall return the original to the court, according to its direction, indorsing thereon the time and manner of service. All proofs of publication, or other mode or modes of giving notice or serving papers, may be made by the affidavit of any person competent to be a witness, which affidavit shall be filed, and shall constitute *prima facie* evidence of such publication or notice of service." Gen. Stats., sec. 2958.

Utah. — Same as California. Comp. Laws, sec. 4291.

Washington. — "The officer to whom the citation is directed shall serve it by delivering a copy to the person or persons named therein, and shall return the original to the court according to its direction, indorsing thereon the time and manner of service." Code Proc., sec. 849.

Wyoming. — Same as California. Laws 1890-91, p. 302, sec. 5.

Service: Cal. Code Civ. Proc., secs. 410 et seq.

Time of: See § 321, *post*.

A citation is to be served in the same manner as a summons, and therefore, in a proper case, may be served by publication: *Ashurst v. Fountain*, 67 Cal. 18; *Spencer v. Houghton*, 68 Cal. 82.

Sureties on administrator's undertaking are not liable for his failure, after citation issued therefor, to

render his final account, unless such citation has been served upon him: *Ashurst v. Fountain*, 67 Cal. 18.

The affidavit or other paper on which the citation was issued must be served with the citation, in order to meet the requirements of this section: See *Southern Pac. R. R. Co. v. Superior Court*, 59 Cal. 471.

§ 320. [1710.] Personal Notice Given by Citation. — When personal notice is required, and no mode of giving it is prescribed in this title, it must be given by citation.

Arizona. — Same. Rev. Stats., sec. 1284.

Idaho. — Same. Rev. Stats., sec. 5661.

Montana. — Same. Comp. Stats., p. 353, sec. 320.

Nevada. — Same. Gen. Stats., sec. 2957.

Utah. — Same. Comp. Laws, sec. 4292.

Washington. — Same. Code Proc., sec. 848.

Wyoming. — Same. Laws 1890-91, p. 302, sec. 6.

§ 321. [1711.] Time of Service.— When no other time is specially prescribed in this title, citations must be served at least five days before the return day thereof.

Arizona. — Same. Rev. Stats., sec. 1285.

Idaho. — Same. Rev. Stats., sec. 5662.

Montana. — Same. Comp. Stats., p. 353, sec. 321.

Nevada. — Same. Gen. Stats., sec. 2959.

Utah. — Same. Comp. Laws, sec. 4293.

Washington. — “In all cases in which citations are issued from the superior court in probate proceedings, they shall be served at least ten days before the term [time] at which they are made returnable, except when issued from the court in cases where the law requires the judge to issue them upon his own motion, and he does so issue them, and in such cases they shall be served in sufficient time to allow the person served to be in attendance on the court.” Code Proc., sec. 850.

Wyoming. — Same as California. Laws 1890-91, p. 302, sec. 7.

§ 322. [1712.] When Description of Realty need not be Published.— When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper, as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale, or notice of a petition for the confirmation thereof. It is sufficient to refer to the description contained in the publication of the first notice, as being proved and on file in the court.

Arizona. — Same. Rev. Stats., sec. 1286.

Idaho. — Same. Rev. Stats., sec. 5663.

Montana. — Same. Comp. Stats., p. 353, sec. 322.

Utah. — Same. Comp. Laws, sec. 4294.

Wyoming. — Same. Laws 1890-91, p. 302, sec. 8.

§ 323. [1713.] Rules of Practice, Generally.— Except as otherwise provided in this title, the provisions of Part II. of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title.

Arizona. — Same. Rev. Stats., sec. 1287.

Idaho. — Same. Rev. Stats., sec. 5664.

Montana. — Same. Comp. Stats., p. 354, sec. 323.

Nevada. — Same. Gen. Stats., sec. 2962.

Utah. — Same. Comp. Laws, sec. 4295.

Wyoming. — Same. Laws 1890-91, p. 302, sec. 9.

See *In re Corwin*, 61 Cal. 160; *In re Crosby*, 55 Cal. 574; *Haffneger v. Bruce*, 54 Cal. 416.

For Part II., see Cal. Code Civ. Proc., secs. 307-1059.

Issues of Fact, how tried: See § 326, *post*.

Exceptions to an account are aids to the court in scrutinizing it, but are not issues of fact to be submitted to a jury: *In re Sanderson*, 74 Cal. 199.

A probate court may correct its own errors in the settlement of estates, either in regard to matters of law or fact, at any time before final settle-

ment, provided, such corrections can be made from the record without opening the proof in the case: *Lucich v. Medin*, 3 Nev. 93. See *In re Millenovich*, 5 Nev. 163.

An error in the names of the petitioners in a case in probate pending and undetermined may be corrected: *Lucich v. Medin*, 3 Nev. 93.

§ 324. [1714.] New Trials and Appeals. — The provisions of Part II. of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title.

Arizona. — Same. Rev. Stats., sec. 1287.

Idaho. — Same. Rev. Stats., sec. 5665.

Montana. — Same. Comp. Stats., p. 354, sec. 324.

Nevada. — Same. Gen. Stats., secs. 2966-2978.

Utah. — Same, except that the words "and appeals" are omitted. Comp. Laws, sec. 4296.

"Either party may move for a new trial upon the same grounds and errors, and in like manner, as provided for civil actions tried by the district court without a jury." Comp. Laws, sec. 4298.

Wyoming. — Same as California. Laws 1890-91, p. 302, sec. 10.

For Part II., see Cal. Code Civ. Proc., secs. 656-663, 936-971.

Where the record on appeal that it will be presumed that the undisclosed evidence influenced the action of the lower court: *In re Winkelman*, 9 Nev. 303.

§ 325. [1715.] Appeal. — The appeal must be taken within sixty days after the order, decree, or judgment is entered.

Arizona. — "Except as otherwise provided in this title, the provisions of the code of procedure in civil cases are applicable to, and constitute the rules of practice in, the proceedings mentioned in this title." Rev. Stats., sec. 1287.

Idaho. — Same as California. Rev. Stats., sec. 5666.

Montana.—Same as California. Comp. Stats., p. 354, sec. 325.

Nevada.—Same as California, except as to time, which is "twenty days." Gen. Stats., sec. 2967.

See *In re Burton*, 64 Cal. 428; *In re Harland*, 64 Cal. 379; *In re Burns*, 54 Cal. 323; *In re Fisher*, 75 Cal. 523.

An appeal from a decree of distribution of an estate of a decedent is governed by section 1715 of the California Code of Civil Procedure, which limits the time to sixty days after the entry of the decree, and will be dismissed if taken after the lapse of that period: *In re Wiard*, 83 Cal. 619.

§ 326. [1716.] Issues Joined, how Tried and Disposed of.—All issues of fact joined in probate proceedings must be tried in conformity with the requirements of Article II., Chapter II., of this title, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions.

Arizona.—Same. Rev. Stats., sec. 1228.

Idaho.—Same. Rev. Stats., sec. 5667.

Montana.—Same. Comp. Stats., p. 354, sec. 326.

Nevada.—"All issues of fact shall be disposed of in the same manner as is by law provided upon the trial of issues of fact in the district court. All questions of costs may be determined by the probate court, and execution may issue therefor, in accordance with the order of the probate court." Gen. Stats., sec. 2963.

Utah.—Same as California. Comp. Laws, sec. 4297.

For Article II., Chapter II., see Cal. Code Civ. Proc., sec. 1312-1318.

Burden of Proof: See § 15, *ante*.

See § 323, *ante*.

Sections 15 to 21, inclusive, *ante*, do not apply to proceedings for granting letters of administration. There the petitioner is plaintiff, and if an administrator has been already appointed, he is the defendant: *In re Wooten*, 56 Cal. 324.

The provisions in this and the next section for trial by jury cannot

be considered as granting an absolute right to a jury trial in cases of the settlement of accounts of executors and administrators, in view of the fact that the language of the code in many places implies that the settlement is to be by the court: *In re Moore*, 72 Cal. 335.

§ 327. [1717.] Court to Try Case when—How Issues Made for Jury.—If no jury is demanded, the court must try the issues joined. If, on written demand, a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried,

and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either may move for a new trial upon the same grounds and errors, and in like manner, as provided in this code for civil actions.

Arizona. — Same, except last sentence omitted. Rev. Stats., sec. 1289.

Idaho. — Same as California. Rev. Stats., sec. 5668.

Montana. — Same as California. Comp. Stats., p. 355, sec. 327.

Wyoming. — "If no jury is demanded, the court must try the issues joined. If, on written demand, a jury is called for by either party, one shall be had as in other civil cases, and if the issues are not sufficiently made," etc.; balance of section same as California. Laws 1890-91, p. 302, sec. 11.

New Trials: See § 324, *ante*.

The verdict being only advisory, if the court finds upon all the issues submitted, mere irregularity in the formation of the jury, or error in the instructions, cannot affect the substantial rights of the parties: *In re Moore*, 72 Cal. 335.

§ 328. [1718.] Attorney for Minor Heirs, etc.— Compensation.—At or before the hearing of petitions and contests for the probate of wills, for letters testamentary, or of administration; for sales of real estate, and confirmations thereof; settlements, partitions, and distribution of estates setting apart homesteads, and all other proceedings where all the parties interested in the estate are required to be notified thereof, — the court may, in its discretion, appoint some competent attorney at law to represent in all such proceedings the devisees, legatees, heirs, or creditors of the decedent who are minors and have no general guardian in the county, or who are non-residents of the state; and those interested who, though they are neither such minors or non-residents, are unrepresented. The order must specify the names of the parties, so far as known, for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may receive a fee, to be fixed by the court, for his services, which must be paid out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney. If, for any cause, it becomes necessary, the court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided. The non-appointment of an attorney will not affect the validity of any of the proceedings.

Arizona. — Same. Rev. Stats., sec. 1290.

Idaho. — Same. Rev. Stats., sec. 5669.

Montana. — Same. Comp. Stats., p. 355, sec. 328.

Nevada. — Upon an application for the sale of real estate, the court shall appoint some disinterested person as attorney for minors, and may also appoint such attorney for heirs, devisees, or creditors interested in the estate. Gen. Stats., sec. 2828.

Some disinterested person shall be appointed by the court to represent any minor interested in the estate, upon the hearing the account of an administrator or executor, who shall be allowed by the court, for his services, a reasonable compensation. The court shall also, if it deems it necessary, appoint an attorney to represent the absent heir and devisees. Gen. Stats., sec. 2904.

In proceedings for partition, some discreet person shall be appointed by the court to act as agent for such parties as reside out of the territory, or an attorney for all absent heirs and persons interested. Gen. Stats., sec. 2939.

"When, upon any proceeding in an estate, an attorney has been appointed for minors and absent persons in interest in the estate, such attorney shall represent such parties in any subsequent proceeding had, unless on such subsequent proceedings another person be appointed, and provided such attorney be present in court in such subsequent proceedings. When any such attorney has been appointed, . . . a reasonable compensation may be allowed out of the estate to such attorney . . . for the services he may have rendered." Gen. Stats., sec. 2964.

Utah. — Same as California. Comp. Laws, sec. 4299.

Washington. — "If any of the devisees or heirs of the deceased are minors, and have a general guardian in the county, the copy of the order shall be served on the guardian. If they have no such guardian, the court shall, before proceeding to act on the petition, appoint some disinterested person their guardian, for the sole purpose of appearing for them, and taking care of their interests in the proceedings." Code Proc., sec. 1009.

"If there be any minor interested in the estate who has no legally appointed guardian, the court shall appoint some disinterested person to represent him, who, on behalf of the minor, may contest the account as any other person interested might contest it, and who shall be allowed by the court a reasonable compensation for his services." Code Proc., sec. 1071.

Wyoming. — Same as California, except that "or commissioner" is inserted after "court," each time it occurs. Laws 1890-91, pp. 302, 303, sec. 12.

Partition of Estate, Guardians in: See § 295, *ante*.

The appointment of an attorney for absent heirs in the contest of a will, and the allowance to him of a fee, to be paid by the estate, are matters entirely within the discretion of the probate court; and if such allowance be improvident or indiscreet, the court may vacate it, at the suggestion of any one, or upon its own motion: *In re Rety*, 75 Cal. 256.

Counsel fees being authorized by this section, an order allowing them

is not unfounded. An allowance of fifty dollars for representing an heir in proceedings to sell real estate is not excessive: *In re Simmons*, 43 Cal. 547.

Attorney appointed by court in probate proceedings cannot bind minors: *In re Devoe*, Myr. Prob. 6; *In re Cameto*, Myr. Prob. 75.

A court cannot appoint an attorney to represent minor heirs who reside in the county, and an order

making such an appointment under such circumstances is void. Any appearance made by such attorney thus appointed is a nullity, and does not give the court jurisdiction in the matter: *Rundolph v. Bayue*, 44 Cal. 366.

If the record shows that an attorney was appointed to represent a minor heir on proceedings set on foot by the administrator to sell lands to pay debts, it will not be presumed a guardian *ad litem* was appointed: *Townsend v. Tallant*, 33 Cal. 45.

Form No. 236. — Order Appointing Attorney.

[Title of Court and Estate.]

A document purporting to be the last will and testament of —, deceased, having been filed in this court, together with a petition for the probate thereof, and it appearing that — and — are minors who are interested in said estate,—

It is ordered that —, Esq., be and he is hereby appointed as an attorney to represent said minors, — and —, in all proceedings had herein. —, Judge of the — Court.

Dated —, 18—.

§ 329. [1719.] Decrees to be Recorded.—When a judgment or decree is made setting apart a homestead, confirming a sale, making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same must be recorded in the office of the recorder of the county in which the property is situated.

Arizona.—Same. Rev. Stats., sec. 1291.

Idaho.—Same. Rev. Stats., sec. 5670.

Montana.—Same. Comp. Stats., p. 355, sec. 329.

Nevada.—Same. Gen. Stats., sec. 2965.

Utah.—Same. Comp. Laws, sec. 4300.

§ 330. [1720.] Costs.—When it is not otherwise prescribed in this title, the superior court, or the supreme court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. Execution for the costs may issue out of the superior court.

Arizona.—Same. Rev. Stats., sec. 1292.

Idaho.—Same. Rev. Stats., sec. 5671.

Montana.—Same. Comp. Stats., p. 356, sec. 330.

Nevada.—Same. Gen. Stats., sec. 2978.

Oregon.—Same; last sentence omitted. *✓* Hill's Laws, sec. 1081.

Utah.—Same as California, except that these words are interpolated after

the word "this," "act, the probate court, or the district court on appeal, or the supreme court on an appeal from the district court," in lieu of the words "title, the superior court, or the supreme court on appeal." Comp. Laws, sec. 4301.

Wyoming. — Same as California, except that "superior" is changed to "district," and after "court," the first time it occurs, the words "or judge" are added. Laws 1890-91, p. 303, sec. 13.

Costs: See *In re Mullins*, 47 Cal. 450.

Where, in a contest of the accounts of an executor, the court below deducted a considerable sum, and then allowed the balance of the accounts, held, that the contestants were entitled to their costs: *In re Millenovich*, 5 Nev. 161.

The priority of the United States only extends to the net proceeds of

the property of the deceased, and therefore the necessary expenses of administration are first to be paid, but this does not include the costs and expenses of defending an action where the claim was *prima facie* just and ought to have been allowed: *United States v. Eggleston*, 4 Saw. 199.

§ 331. [1721.] Letters Revoked for Contempt. — Whenever an executor, administrator, or guardian is committed for contempt in disobeying any lawful order of the court, or a judge thereof, and has remained in custody for thirty days without obeying such order, or purging himself otherwise of the contempt, the court may, by order reciting the facts, and without further showing or notice, revoke his letters and appoint some other person entitled thereto executor, administrator, or guardian in his stead.

Arizona. — Same. Rev. Stats., sec. 1293.

Idaho. — Same. Rev. Stats., sec. 5672.

Montana. — Same. Comp. Stats., p. 356, sec. 331.

Utah. — Same. Comp. Laws, sec. 4302.

Failure to pay to distributee his share of estate after order entered is contempt of court: *In re Taylor*, Myr. Prob. 160; *In re Smith*, 53 Cal. 204.

§ 332. [1722.] Service of Process on Guardian. — Whenever an infant, insane or incompetent person, has a guardian of his estate residing in this state, personal service upon the guardian of any process, notice, or order of the court concerning the estate of a deceased person, in which the ward is interested, is equivalent to service upon the ward, and it is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward and waive any process, notice, or order to show cause which an adult or a person of sound mind might do.

Arizona. — Same. Rev. Stats., sec. 1294.

Idaho. — Same. Rev. Stats., sec. 5673.

Montana. — Same. Comp. Stats, p. 356, sec. 332.

Utah. — Same. Comp. Laws, sec. 4303.

Wyoming. — Same. Laws 1890-91, p. 303, sec. 14.

§ 333. [1723.] **Life Estate, Proceedings to Terminate.** — If any person has died, or shall hereafter die, who at the time of his death was the owner of a life estate which terminates by reason of the death of such person, any person interested in the property, or in the title thereto, in which such life estate was held, may file in the superior court of the county in which the property is situated his verified petition, setting forth such facts, and thereupon, and after such notice, by publication or otherwise, as the court may order, the court shall hear such petition and the evidence offered in support thereof, and if, upon such hearing, it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, the court shall make a decree to that effect, and thereupon a certified copy of such decree may be recorded in the office of the county recorder, and thereafter shall have the same effect as a final decree of distribution so recorded.

Idaho. — Same. Rev. Stats., sec. 5674.

Utah. — Same. Comp. Laws, sec. 4304.

Wyoming. — Same, except that "superior" is omitted, and "county recorder" is changed to "county clerk." Laws 1890-91, pp. 303, 304, sec. 15.

Form No. 237. — Petition for Decree Showing that Life Estate has Terminated.

[Title of Court.]

In the matter of the life estate of —.

The petition of — respectfully shows: —

That he is the owner of the reversionary interest in the following described real property, to wit (here insert description); that —, on the — day of —, A. D. 18—, became the owner of an estate therein during his own life; that said — died on or about the — day of —, A. D. 18—, and his life estate in said premises has absolutely terminated, and petitioner has become entitled to the possession of said premises; —

Wherefore petitioner prays that a decree of this court be made, showing that said — is now deceased, that his life es-

tate in said premises has terminated, and that petitioner is the owner of said premises and entitled to the possession of the same.

—, Petitioner.

—, Attorney for Petitioner.

(Verification as in Form No. 55, § 80, *ante*.)

**Form No. 237.—Decree Showing that Life Estate
has Terminated.**

[Title of Court.]

In the matter of the life estate of —.

The petition of — coming on regularly to be heard this day, and the court having heard said petition and the evidence offered in support thereof, and it appearing that — had a life estate in the property hereinafter described; that he is now dead; that his said estate has absolutely terminated, and that said petitioner is the owner of said real property, and entitled to the possession thereof; —

It is therefore ordered, adjudged, and decreed that the life estate of — has absolutely terminated in the following described real property, to wit (here insert description); that such termination of said estate has been caused by the death of said —, who departed this life on the — day of —, A. D. 18—.

—, Judge of the — Court.

Dated —, 18—.

CHAPTER XIII.

MISCELLANEOUS PROVISIONS.

ARTICLE I. OF PUBLIC ADMINISTRATOR.

II. MISCELLANEOUS PROVISIONS.

III. OF COMMUNITY AND SEPARATE PROPERTY.

ARTICLE I.

OF PUBLIC ADMINISTRATOR.

- § 334. Duty of public administrator.
- § 335. To obtain letters, when and how — His bond and oath.
- § 336. Duty of persons in whose house any stranger dies.
- § 337. Must administer estates according to this title.
- § 338. When he must deliver up estate.
- § 339. Civil officers to give notice of waste to.
- § 340. Suits for property of decedents.
- § 341. Order to examine party embezzling estate.
- § 342. Punishment for refusing to attend.
- § 343. Order on public administrator to account.
- § 344. To make and publish return of condition of estate when.
- § 345. Disposition of funds.
- § 346. Not to be interested in the payments, etc.
- § 347. To settle with county clerk — Unclaimed estate.
- § 348. Proceedings upon failure to pay over money.
- § 349. Fees of officers, when and by whom paid.
- § 350. Public administrator to administer oaths.
- § 351. Chapters applicable to public administrator.

§ 334. [1726.] **Duty of Public Administrator.** — Every public administrator, duly elected, commissioned, and qualified, must take charge of the estates of persons dying within his county, as follows: —

1. Of the estate of decedents for which no administrators are appointed, and which, in consequence thereof, are being wasted, uncared for, or lost;
2. Of the estate of decedents who have no known heirs;
3. Of the estates ordered into his hands by the court; and
4. Of the estates upon which letters of administration have been issued to him by the court.

Arizona. — “Every person holding the office of administrator who willfully refuses or neglects to perform the duties thereof, or who violates any provisions of law relating to his duties, or the duties of his office, for which some other punishment is not prescribed, is punishable by fine not exceeding five thousand dollars, or imprisonment in the territorial prison not exceeding two years, or both.” Pen. Code, sec. 228.

Idaho. — Same as California. Rev. Stats., sec. 5681.

“The county treasurers of the various counties of this territory are hereby declared to be *ex officio* public administrators in their respective counties.” Rev. Stats., sec. 5680.

Montana. — Same as California. Comp. Stats., p. 357, sec. 333.

Nevada. — “The public administrator of each county shall have the right, and it is hereby made his duty, to administer, according to law, upon the estate of any person who died intestate in, or was at the time of his or her death a resident of, the county, or had assets therein, not administered on in some other county, or of a deceased stranger, or of a deceased testate when no executor is appointed, or if appointed fails to qualify, unless administered upon within one month after the death of the testate, or within the time provided by law for an intestate, or by a relative by blood or marriage within the fourth degree of consanguinity or legal relation.” Gen. Stats., sec. 2223.

Wyoming. — **Duty of County Attorney upon Learning of the Death of a Person — Duty of Clerk when Petition Filed.** — “Upon information being received by the county attorney of any county from an officer or citizen of such county, that a person has died within such county, leaving an estate estimated to be of the value of five hundred dollars or less, it shall be the duty of such attorney to cause a full and complete inventory of such estate to be made, following as near as may be the provisions of this act in so doing, and file the same, with a petition setting forth all the facts of the case, in the district court of such county, and the property belonging to such deceased person shall also be surrendered to the clerk of such court, who shall have the same power to receive and receipt for debts due such deceased persons as are given executors and administrators by this act, and the same power to account and dispose of such estate in the interests thereof; and the court or judge shall review the proceedings thus had and provide for the further or final disposition thereof to the heirs as provided by law, and upon such terms and under such conditions as shall seem to the best advantage of the estate and heirs thereof.” Laws 1890-91, p. 304, sec. 16.

Sections Made Applicable: See § 352, *post*; *Beckett v. Selover*, 7 Cal. 215.

Fees: See § 252, *ante*.

§ 335. [1727.] To Obtain Letters, when and how — His Bond and Oath. — Whenever a public administrator takes charge of an estate, which he is entitled to administer without letters of administration being issued, or under order of the court, he must, with all convenient dispatch, procure letters of administration thereon, in like manner and on like

proceedings as letters of administration are issued to other persons. His official bond and oath are in lieu of the administrator's bond and oath; but when real estate is ordered to be sold, another bond may be required by the court.

Idaho. — Same, except that the following is added: "No notice of application for letters by a public administrator is necessary." Rev. Stats., sec. 5682.

Montana. — Same as California. Comp. Stats., p. 357, sec. 334.

Nevada. — "Public administrators are authorized to administer on the estate of any deceased person in any case where by law he is entitled to administer by virtue of his office, and shall be required to make formal application for letters of administration as in the case of administrators, but he shall not be required to file or have approved any bond, except as such public administrator, in any case; *provided*, that the bond of any public administrator may be increased as provided in this or other acts." Gen. Stats., sec. 2233.

Bond on Sale of Real Estate: See § 72, *ante*.

Sections Made Applicable: See § 351, *post*.

An order appointing the public administrator to administer upon an estate failed to mention his official capacity, as also did his letters of administration. The petition for letters was made in his official capacity; it was held, in an action on his official bond, that the letters were issued to him in his official character, and that his sureties were liable for money of the estate wrongfully appropriated by him: *Mitchell v. Hecker*, 59 Cal. 558.

As the public administrator gives an official bond and takes an oath of office, it seems to have been the intention of the legislature to dispense with the oath and bond required of other administrators: *Beckett v. Selover*, 7 Cal. 215.

He does not acquire by virtue of

his office a right to administer upon an estate, but must be appointed as such administrator by the court: *Beckett v. Selover*, 7 Cal. 215; *In re Hamilton*, 34 Cal. 464; *Rogers v. Hoherlein*, 11 Cal. 128; *In re Aveline*, 53 Cal. 260.

The public administrator may receive letters of administration notwithstanding the deceased expressed a wish to have another person settle his estate: *In re Morgan*, 53 Cal. 243.

In a contest between the public administrator and a creditor, if other creditors request his appointment, the court has the discretion to do so: *In re Doak*, 46 Cal. 573.

Grant of administration sufficient, even though no letters have been issued thereunder to the public administrator: *Abel v. Love*, 17 Cal. 233.

§ 336. [1728.] Duty of Persons in whose House Any Stranger Dies. — Whenever a stranger, or person without known heirs, dies intestate in the house or premises of another, the possessor of such premises, or any one knowing the facts, must give immediate notice thereof to the public administrator of the county; and in default of so doing, he is liable for any damage that may be sustained thereby, to be recovered by the public administrator, or any party interested.

Idaho. — Same. Rev. Stats., sec. 5683.

Montana. — Same. Comp. Stats., p. 357, sec. 335.

§ 337. [1729.] Must Administer Estates According to This Title.—The public administrator must make and return a perfect inventory of all estates taken into his possession, administer and account for the same, according to the provisions of this title, subject to the control and directions of the court.

Idaho.—Same. Rev. Stats., sec. 5684.

Montana.—Same. Comp. Stats., p. 358, sec. 336.

See *Beckett v. Selover*, 7 Cal. 215.

Sections Made Applicable: See § 352, *post*.

The public administrator is liable personally upon a contract made in relation to estates which he administers, unless that idea is excluded by the contract itself: *Dwinelle v. Enriquez*, 1 Cal. 387.

§ 338. [1730.] When He must Deliver up Estate.—If, at any time, letters testamentary or of administration are regularly granted to any other person on an estate of which the public administrator has charge, he must, under the order of the court, account for, pay, and deliver to the executor or administrator thus appointed all the money, property, papers, and estate of every kind in his possession or under his control.

Idaho.—Same. Rev. Stats., sec. 5685.

Montana.—Same. Comp. Stats., p. 358, sec. 337.

See *Beckett v. Selover*, 7 Cal. 215.

Sections Made Applicable: See § 351, *post*.

§ 339. [1731.] Civil Officers to Give Notice of Waste to Him.—All civil officers must inform the public administrator of all property known to them, belonging to a decedent, which is liable to loss, injury, or waste, and which, by reason thereof, ought to be in possession of the public administrator.

Idaho.—Same. Rev. Stats., sec. 5686.

Montana.—Same. Comp. Stats., p. 358, sec. 338.

Nevada.—“It shall be the duty of all persons, especially of all civil officers, to give all information in their possession to public administrators respecting estates and the property and condition thereof, upon which no other person has then administered. Public administrators may, and it is hereby made their official duty, to institute, maintain, and prosecute all necessary actions at law and in equity for the recovery and for the protection of the property, debts, papers, or other estate of any deceased person upon whose estate they may be administering.” Gen. Stats., sec. 2228.

§ 340. [1732.] Suits for Property of Decedents. — The public administrator must institute all suits and prosecutions necessary to recover the property, debts, papers, or other estate of the decedent.

Idaho. — Same. Rev. Stats., sec. 5687.

Montana. — Same. Comp. Stats., p. 358, sec. 339.

Nevada. — See Gen. Stats., sec. 2228, under last section.

Sections Made Applicable: See § 487, *post*.

§ 341. [1733.] Order to Examine Party Embezzling Estate. — When the public administrator complains to the superior court, or a judge thereof, on oath, that any person has concealed, embezzled, or disposed of, or has in his possession, any money, goods, property, or effects, to the possession of which such administrator is entitled in his official capacity, the court or judge may cite such person to appear before the court, and may examine him on oath touching the matter of such complaint.

Idaho. — Same. Rev. Stats., sec. 5688.

Montana. — Same. Comp. Stats., p. 358, sec. 340.

Citation: See §§ 317-321, *ante*.

§ 342. [1734.] Punishment for Refusing to Attend. — All such interrogatories and answers must be reduced to writing and signed by the party examined, and filed in the court. If the person so cited refuses to appear and submit to such examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may commit him to the county jail, there to remain in close custody until he submits to the order of the court.

Idaho. — Same. Rev. Stats., sec. 5689.

Montana. — Same. Comp. Stats., p. 358, sec. 341.

§ 343. [1735.] Public Administrator to Account. — The court may at any time order the public administrator to account for and deliver all the money and property of an estate in his hands to the heirs, or to the executors or administrators regularly appointed.

Idaho. — Same. Rev. Stats., sec. 5690.

Montana. — Same. Comp. Stats., p. 358, sec. 342.

The public administrator continues as administrator of an estate after the expiration of his term of office and until his authority is directly set aside or indirectly revoked by another appointment: *Rogers v. Hoberlein*, 11 Cal. 120. Said case is cited and explained in *Abel v. Love*, 17 Cal. 234.

§ 344. [1736.] When to Make and Publish Return of Condition of Estate. — The public administrator must, once in every six months, make to the superior court, under oath, a return of all estates of decedents which have come into his hands, the value of the same, the money which has come into his hands from such estate, and what he has done with it, and the amount of his fees and expenses incurred, and the balance, if any, remaining in his hands; publish the same six times in some newspaper published in the county, or if there is none, then post the same, legibly written or printed, in the office of the county clerk of the county.

Idaho. — Same, except provision as to publication and posting omitted. Rev. Stats., sec. 5691.

Montana. — Same. Comp. Stats., p. 358, sec. 343.

Nevada. — "Each public administrator shall, on the first Monday in January and July in each year, and at the termination of his official duties, make a verified written report to the district judge having jurisdiction in the premises, of all estates of deceased persons which have officially passed into his hands, the value of the same, the expenses, if any, paid thereon, and the balance of property, effects, or money, if any, remaining in his hands; and the judge to whom such report is made shall cause it to be made public by publication or posting, as he may deem just and right." Gen. Stats., sec. 2224.

Publication: See § 315, *ante*.

Sections Made Applicable: See § 351, *post*.

§ 345. [1737.] Disposition of Funds. — It is the duty of every public administrator, as soon as he shall receive the same, to deposit with the county treasurer of the county in which the probate proceedings are pending all moneys of the estate not required for the current expenses of the administration; and such moneys may be drawn upon the order of the executor or administrator, countersigned by a superior judge, when required for the purposes of administration. It shall be the duty of the county treasurer to receive and safely keep all such moneys, and pay them out upon the order of the executor or administrator, when countersigned by a superior judge, and not otherwise, and to keep an account with such estate of all moneys received and paid to him; and the county treasurer

shall be allowed one per cent upon all moneys received and kept by him, and no greater fees for any services herein provided; and for the safe-keeping and payment of all such moneys, as herein provided, the said treasurer and his sureties shall be responsible upon his official bond. The moneys thus deposited may, upon order of the court, be invested, pending the proceedings, in securities of the United States, or of this state, when such investment is deemed by the court to be for the best interests of the estate. After a final settlement of the affairs of any estate, if there be no heirs, or other claimants thereof, the county treasurer shall pay into the state treasury all moneys and effects in his hands belonging to the estate, upon order of the court; and if any such moneys and effects escheat to the state, they must be disposed of as other escheated estates.

Idaho. — "After a final settlement of the affairs of any estate, if there be no heirs or other claimants thereof, the public administrator must pay into the territorial treasury all moneys and effects in his hands belonging to the estate, as provided in chapter 11 of this title for payments by agents." Rev. Stats., sec. 5692.

Montana. — Same as California. Comp. Stats., p. 359, sec. 344.

Nevada. — "Each executor, administrator, and public administrator, on final settlement of an estate and proper order of the court having jurisdiction in the matter thereof, or before final settlement, upon the regular order of the court aforesaid, shall pay over all moneys of such estate to the lawful heirs, or legatees or devisees thereof, and if there be none of either, then to the county treasurer, and the county treasurer shall pay the same to the state treasurer, and if the same escheat to the state, the state treasurer shall place the same in the fund devoted and pledged to educational purposes." Gen. Stats., sec. 2225.

See *In re Walsh*, Myr. Prob. 251.

Sections Made Applicable: See § 351, *post*.

Public administrator may deposit moneys with certain corporation: See § 76, *ante*.

§ 346. [1738.] Not to be Interested in Payments, etc.—The public administrator must not be interested in the expenditures of any kind made on account of any estate he administers; nor must he be associated, in business or otherwise, with any one who is so interested, and he must attach to his report and publication, made in accordance with the preceding section, his affidavit to that effect.

Idaho. — Same, except last clause omitted. Rev. Stats., sec. 5693.

Montana. — Same as California. Comp. Stats., p. 359, sec. 345.

Nevada. — Same as California, except that he must so state in his semi-annual reports in lieu of the affidavit. Gen. Stats., sec. 2226.

Sections Made Applicable: See § 351, *post*.

§ 347. [1739.] **To Settle with County Clerk — Unclaimed Estate.** — Public administrators are required to account under oath, and to settle and adjust their accounts, relating to the care and disbursement of money or property belonging to estates in their hands, with the county clerks of their respective counties, on the first Monday in each month; and they must pay to the county treasurer any money remaining in their hands of an estate unclaimed, as provided in sections sixteen hundred and ninety-three to sixteen hundred and ninety-six, both inclusive.

Montana. — Same. Comp. Stats., p. 359, sec. 346.

Sections Made Applicable: See § 351, *post*.

§ 348. [1740.] **Proceedings upon Failure to Pay over Money.** — When it appears, from the returns made in pursuance of the foregoing sections, that any money remains in the hands of the public administrator (after a final settlement of the estate), unclaimed, which should be paid over to the county treasurer, the superior court, or a judge thereof, must order the same to be paid over to the county treasurer; and on failure of the public administrator to comply with the order within ten days after the same is made, the district attorney for the county must immediately institute the requisite proceedings against the public administrator for a judgment against him and the sureties on his official bond, in the amount of money so withheld, and costs.

Idaho. — Same, except that "territorial treasurer" is substituted for "county treasurer." Rev. Stats., sec. 5694.

Montana. — Same. Comp. Stats., p. 360, sec. 347.

Sections Made Applicable: See § 351, *post*.

§ 349. [1741.] **Fees to be Paid.** — The fees of all officers chargeable to estates in the hands of public administrators must be paid out of the assets thereof, so soon as the same come into his hands.

Montana. — Same. Comp. Laws, p. 360, sec. 348.

§ 350. [1742.] **Public Administrator to Administer Oaths.** — Public administrators may administer oaths

in regard to all matters touching the discharge of their duties, or the administration of estates in their hands.

Montana. — Same. Comp. Stats., p. 360, sec. 349.

§ 351. [1743.] Chapters Applicable to Public Administrator. — When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provisions of the preceding chapters of this title must govern.

Idaho. — Same. Rev. Stats., sec. 5695.

Montana. — Same. Comp. Stats., p. 360, sec. 350.

Nevada. — Same. Gen. Stats., sec. 2229.

ARTICLE II.

MISCELLANEOUS PROVISIONS.

§ 352. "Will" includes codicil.

§ 353. Minors, who are.

§ 354. Powers of persons whose incapacity has been adjudged.

§ 355. Children of annulled marriage.

§ 352. [14.] Will Includes Codicil. — The word "will" includes codicils.

Arizona. — Same. Rev. Stats., sec. 2932.

Idaho. — Same. Rev. Stats., sec. 16.

Nevada. — Same. Gen. Stats., sec. 3020.

Oregon. — Same. Hill's Laws, sec. 3096.

Utah. — Same. Comp. Laws, sec. 2997.

Washington. — Same. Gen. Stats., sec. 1477.

Will: See § 367, *post*.

§ 353. [25.] Minors, Who are. — Minors are: 1. Males under twenty-one years of age; 2. Females under eighteen years of age.

Idaho. — Same. Rev. Stats., sec. 2405.

Nevada. — Same. Rev. Stats., sec. 2943.

Oregon. — Same. Hill's Laws, sec. 2951.

Utah. — Same, except that the following is added: "But all minors obtain their majority by marriage." Comp. Laws, sec. 2560.

Washington. — "Males shall be deemed and taken to be of full age for all purposes at the age of twenty-one years and upwards; females shall be deemed and taken to be of full age at the age of eighteen years and upwards." Gen. Stats., sec. 1416.

"All females married to a person of full age shall be deemed and taken to be of full age." Gen. Stats., sec. 1417.

Wyoming. — Age of majority for both men and women is twenty-one years. Rev. Stats., p. 30, sec. 5; also Rev. Stats., p. 321, sec. 1103.

§ 354. [40.] Powers of Persons whose Incapacity has been Adjudged. — After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity. But a certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person had been discharged therefrom, cured and restored to reason, shall establish the presumption of legal capacity in such person from the time of such discharge.

Idaho. — Same. Rev. Stats., sec. 2412.

§ 355. [84.] Children of Annulled Marriage. — Where a marriage is annulled on the ground that a former husband or wife was living, or on the ground of insanity, children begotten before the judgment are legitimate, and succeed to the estate of both parents.

Idaho. — Same. Rev. Stats., sec. 2452.

Montana. — "The issue of all marriages null in law, or dissolved by divorce, are legitimate." Comp. Stats., p. 397, sec. 536.

ARTICLE III.

COMMUNITY AND SEPARATE PROPERTY.

§ 356. Separate property of wife.

§ 356 a. Separate property of husband.

§ 356 b. Community property.

§ 356 c. Wife living apart from husband — Property of, in earnings of herself and of her minor children.

§ 357. Children presumed legitimate when.

§ 358. Same.

§ 359. Legitimacy, who may dispute — How illegitimacy proven.

§ 360. Property, who may hold, etc.

§ 361. Alien claiming property — Limitation.

§ 362. Posthumous children.

§ 363. Qualities of expectant estate.

§ 364. Possibility not an interest.

§ 365. Effect of will on gift.

§ 366. Tenure to homestead.

§ 356. [162.] Separate Property of Wife.—All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property.

See Cal. Civ. Code, sec. 169.

Arizona.—Same, except that the word “bequest” is omitted, and after “property” the words “both real and personal” are inserted. Rev. Stats., sec. 2100.

Idaho.—Same, except that the words “with the rents, issues, and profits thereof” are omitted. Rev. Stats., sec. 2495. See also Rev. Stats., sec. 2497.

Rents, Issues, and Profits are community property, except in certain cases: See Rev. Stats., sec. 2497, under § 356 b, *post.*

Montana.—“That the property owned by any married woman before her marriage, and that which she may acquire after her marriage by descent, gift, grant, devise, or otherwise, and the increase, use, and profits thereof, shall be exempt from all debts and liabilities of the husband, unless for necessary articles procured for the use and benefit of herself and her children under the age of eighteen years; *provided, however,* that the provisions of this chapter shall extend only to such property as shall be mentioned in a list of the property of such married woman as is on record in the office of the register of deeds of the county in which such married woman resides.” Comp. Stats., p. 1044, sec. 1432.

“From and after the passage of this act, women shall retain the same legal existence and legal personalty after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man.” Act approved March 3, 1887. Comp. Stats., p. 1045, sec. 1439.

Nevada.—Same as California. Gen. Stats., sec. 499.

“When the husband has allowed the wife to appropriate to her own use her earnings, the same, with the issues and profits thereof, is deemed a gift from him to her, and is, with such issues and profits, her separate property.” Gen. Stats., sec. 513.

Oregon.—“The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of her husband, and she may manage, sell, convey, or devise the same by will to the same extent and in the same manner that her husband can property belonging to him.” Hill’s Laws, sec. 2992. See also Const., art. 15, sec. 5.

“All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband are hereby repealed.” Hill’s Laws, sec. 2998.

“The property, either real or personal, acquired by any married woman during coverture, by her own labor, shall not be liable for the debts, contracts, or liabilities of her husband; but shall in all respects be subject to the same exemptions and liabilities as property owned at the time of her marriage, or afterwards acquired by gift, devise, or inheritance.” Hill’s Laws, sec. 2993.

Washington. — "Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued, as if he or she were unmarried." Gen. Stats., sec. 1408.

"The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber, or devise by will such property, to the same extent and in the same manner that her husband can property belonging to him." Gen. Stats., sec. 1398.

"A wife may receive the wages of her personal labor, and maintain an action therefor in her own name, and hold the same in her own right, and she may prosecute and defend all actions at law for the preservation and protection of her rights and property as if unmarried." Gen. Stats., sec. 1402.

Whatever property a woman has at her marriage, or acquires afterwards by gift, devise, or inheritance, remains hers until she voluntarily parts with it: *Brummet v. Weaver*, 2 Or. 173; *Rugh v. Ottenheimer*, 6 Or. 231; *Atterberry v. Atterberry*, 8 Or. 224; *Besser v. Joyce*, 9 Or. 310; *Starr v. Hamilton*, 1 Deady, 272; *Stubblefield v. Menzies*, 8 Saw. 41.

§ 356 a. [163.] Separate Property of Husband. — All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property.

Arizona. — Same, except that after "property" the words "both real and personal" are inserted, and the word "bequest" is omitted. Rev. Stats., sec. 2100.

Idaho. — Same as California, except that the words "with the rents, issues, and profits" are omitted. Rev. Stats., sec. 2496.

Rents, issues, and profits are community property, except in certain cases: See Rev. Stats., sec. 2497, under § 356 b, *post*.

Montana. — See last section.

Nevada. — Same as California. Gen. Stats., sec. 499.

Oregon. — See Hill's Laws, sec. 2869.

Common-law Rule in Force: *Pitman v. Sands*, 4 Or. 298; *Elfelt v. Tench*, 5 Or. 255.

Washington. — "Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise by will such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried." Gen. Stats., sec. 1397.

§ 356 b. [164.] Community Property. — All other property acquired after marriage, by either husband or wife, or both, is community property.

Arizona. — Same. Rev. Stats., sec. 2102.

Idaho. — "All other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband or wife, is community property, unless by the instrument by which any such property is acquired by the wife it is provided that the rents and profits thereof be applied to her sole and separate use, in which case the management and disposal of such rents and profits belong to the wife, and they are not liable for the debts of the husband." Rev. Stats., sec. 2497.

"Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either." Rev. Stats., sec. 2829.

Nevada. — "All other property acquired after marriage, by either husband or wife, or both, except as provided in sections 14 and 15 of this act [Gen. Stats., sec. 512, 513], is community property." Gen. Stats., sec. 500.

Washington. — "Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one half thereof." Gen. Stats., sec. 1399.

"The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife." Gen. Stats., sec. 1400.

Husband and wife may agree concerning the *status* or disposition of the whole or any part of the community property owned or to be owned by them, to take effect upon the death of either. Gen. Stats., sec. 1401.

Land the title to which is taken in a wife's name, but which is paid for with community funds, is community property, and after the death of the wife, belongs to the surviving husband, without administration, and the estate of the wife takes no title or interest in it which can be conveyed to any person: *Dean v. Parker*, 88 Cal. 283.

Community property descends

to the widow and children of decedent without administration, where the property was acquired by the husband under the Mexican law in force in California in 1849, and at his request a conveyance was made to his wife, which said property was thereafter held by her as community property until his death: *Lataillade v. Oreña*, 91 Cal. 579.

§ 356 c. [169.] **Earnings, etc., of Wife and Minor Children.** — The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.

Arizona. — Same. Rev. Stats., sec. 2101.

Idaho. — Same. Rev. Stats., sec. 2502.

Nevada. — Same. Gen. Stats., sec. 512.

Washington. — Same. Gen. Stats., sec. 1403.

"The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife." Gen. Stats., sec. 1403.

The act of a husband in filing a petition for letters of administration on his deceased wife's estate, setting forth therein that the land in controversy was his wife's separate estate, and causing the same to be sold as such by order of the probate court, does not estop a grantee of the hus-

band, in an action to quiet title against a grantee of the purchaser of the property as the estate of the wife, at the probate sale, from showing that the property was community property, and belonged to the husband: *Dean v. Parker*, 88 Cal. 283.

§ 357. [193.] Legitimacy of Children Born in Wedlock. — All children born in wedlock are presumed to be legitimate.

§ 358. [194.] Children after Dissolution of Marriage. — All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage.

§ 359. [195.] Legitimacy, Who may Dispute — How Proven. — The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy in such case may be proved like any other fact.

The declarations of a testator made in his will are competent evidence after his death, tending to prove his marriage and the legitimacy

of his children, in a case where the persons so declared his wife and children are the devisees: *Pearson v. Pearson*, 46 Cal. 610.

§ 360. [671.] Who may Hold Property. — Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state.

Arizona. — Alien may take by devise or descent. Rev. Stats., sec. 1472. See also U. S. Stats. 1887, c. 340, p. 476.

Idaho. — Same as California. Rev. Stats., sec. 2827. See also U. S. Stats. 1887, c. 340, p. 446.

"Widows or heirs who are aliens, or who have not declared their intentions to become citizens, are not prevented from holding lands by inheritance; but all lands so acquired shall be sold within five years after the title thereto shall be perfected in such alien, and in default of such sale within such time, such real estate shall revert and escheat to the state of Idaho. Mining lands, etc., are excepted from the provisions of this law." Laws 1890-91, pp. 108, 109, sec. 1.

Montana. — Resident aliens take as citizens. Comp. Stats., p. 400, sec. 553. See also U. S. Stats. 1887, c. 340, p. 446.

Oregon. — White resident foreigners take by succession, as citizens. Const., art. 1, sec. 31; Hill's Laws, p. 82; also Hill's Laws, sec. 2988.

Washington. — Any alien, except such as by the laws of the United States are incapable of becoming citizens of the United States, may acquire and hold lands, or any right thereto or interest therein, by purchase, devise, or descent, and he may convey, mortgage, and devise the same, and if he shall die intestate, the same shall descend to his heirs; and in all cases such lands shall be held, conveyed, mortgaged, or devised, or shall descend in like manner and with like effect as if such alien were a citizen of this state or of the United States. Gen. Stats., sec. 2956.

Section 17, article I, of the constitution does not inhibit the legislature from extending the rights of succession or inheritance to non-resident alien heirs: *People v. Rogers*, 13 Cal. 159; *In re Billings*, 64 Cal. 593.

The word "take," used in the

above section, is broad enough to include the taking by *descent* as well as by purchase. This taking of property is not confined to an alien residing in the state. Section 672, subdivision 361, of the Civil Code confirms this interpretation of said section: *In re Billings*, 65 Cal. 594.

§ 361. [672.] Aliens must Claim within Five Years. — If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in Title VIII., Part III., Code of Civil Procedure.

For Title VIII., Part III., see Escheated Estates.

Arizona. — "In making title to land by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is or hath been an alien; and every alien to whom any land may be devised or may descend shall have five years to become a citizen of the territory and take possession of such land, or shall have five years to sell the same before it shall be declared forfeited or shall escheat to the government; *provided*, that the treaties of the United States with the nation to which such alien may belong do not otherwise direct; *and provided further*, that aliens may take and hold any property, real or personal, in this territory, by devise or descent, from any alien or citizen, in the same manner in which citizens of the United States may take and hold real or personal estate, by devise or descent, within the country of such alien." Rev. Stats., sec. 1472.

Idaho. — "Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession, unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession." Rev. Stats., sec. 5715.

Montana. — Same as Idaho. Comp. Stats., p. 400, sec. 553.

§ 362. [698.] Posthumous Children.—When a future interest is limited to successors, heirs, issue, or children, posthumous children are entitled to take in the same manner as if living at the death of their parent.

Arizona.—Posthumous children do not inherit. Rev. Stats., sec. 1464.

Idaho.—Same as California. Rev. Stats., sec. 2833.

Nevada.—Posthumous children inherit. Gen. Stats., secs. 2613, 2614.

Oregon.—Posthumous child deemed living at death of parent. Hill's Laws, sec. 3111.

Utah.—Posthumous children inherit. Comp. Laws, sec. 265.

§ 363. [699.] Qualities of Expectant Estates.—Future interests pass by succession, will, and transfer, in the same manner as present interests.

Idaho.—Same. Rev. Stats., sec. 2834.

§ 364. [700.] Possibility not an Interest.—A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind.

§ 365. [1152.] Effect of Will upon Gift.—A gift in view of death is not affected by a previous will, nor by a subsequent will, unless it expresses an intention to revoke the gift.

§ 366. [1265.] Tenure by Which Homestead is Held.—From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this title.

See § 274, *post*; *Beck v. Soward*, 76 Cal. 527.

Arizona.—“If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was

selected from the community property, it vests, on the death of the husband or wife, absolutely in the survivor; if the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the probate court to assign it for a limited period to the family of the decedent. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in this code." Rev. Stats., sec. 1100.

Idaho. — Same as California. Rev. Stats., sec. 3073.

Montana. — Same as Arizona. Comp. Stats., p. 307, sec. 140.

Washington. — "The husband cannot select a homestead from the separate property of the wife, nor the wife from the separate property of the husband, but either may select and hold a homestead from his or her separate property, and the husband may select a homestead from the community property. But if the husband neglect or refuse to select such homestead, then the wife may select the same; *provided*, that but one homestead shall be selected or held by husband or wife, and it must embrace the dwelling-house in which one or both of them reside." Gen. Stats., sec. 1404.

CHAPTER XIV.

EXECUTION AND REVOCATION OF WILLS.

- § 367. Who may make a will.
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§ 367. [1270.] Who may Make a Will. — Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided for in Title VII. of this part, being chargeable in both cases with the payment of all the decedent's debts, as provided in the Code of Civil Procedure.

For Title VII., etc., see Succession.

Arizona. — "Every person aged twenty-one years or upwards, or who may be or may have been lawfully married, being of sound mind, shall have power to make a last will and testament, under the rules and limitations prescribed by law." Rev. Stats., sec. 3232.

Idaho. — Same as California. Rev. Stats., sec. 5725.

Montana. — Same as California. Comp. Stats., p. 380, sec. 432.

"A person having an insane delusion is incompetent to make a will." Rev. Stats., sec. 433.

Nevada. — Same as California. Gen. Stats., sec. 3000.

Oregon. — "Every person of twenty-one years of age and upwards, of sound mind, may, by last will, devise all his estate, real and personal, saving to the widow her dower." Hill's Laws, sec. 3066.

"Every person over the age of eighteen years, of sound mind, may, by last will, dispose of his goods and chattels." Hill's Laws, sec. 3067.

Utah. — Same as California, except that in lieu of "Title VII. of this part" substitute "Title II. of this act," and instead of "Code of Civil Procedure," insert "an act relating to the procedure of probate courts." (Comp. Laws, sec. 3988.) Comp. Laws, sec. 2647.

Washington. — "Every person who shall have attained the age of majority, of sound mind, may, by last will, devise all his or her estate, real and personal." Gen. Stats., sec. 1458.

Age of Majority: See § 354, *ante*.

Will Includes Codicil: See § 353, *ante*.

Will, Definition of: *Jasper v. Jasper*, 17 Or. 590.

In construing an instrument to determine whether it is a will or deed, the intention is to control, as collected from the whole instrument: *Faull v. Cooke*, 19 Or. 455.

When an instrument conveys a present title to the grantee, and the grantor reserves out of the estate conveyed the right to the use and possession during his life, the instrument is a deed, and not a will: *Faull v. Cooke*, 19 Or. 455.

Husband can only dispose of one half of the community property by will: See § 481, *post*, and notes.

In this state there is no limitation

upon the power of disposition by will: *Norris v. Harris*, 15 Cal. 226.

Acceptance of a devise under a will by a widow, in which her late husband disposes of the entire community property, is a confirmation by her of his action, and she will not be entitled to take any of the community property in her own right, but can take only such as she is given by the will: *In re Stewart*, 74 Cal. 98.

Though a testator has not the power to dispose of the property of another person by his will, still, if he undertakes to do so, and such person accepts a devise or bequest under the

will, such acceptance is a confirmation of the testamentary disposition of the testator: *Morrison v. Bowman*, 29 Cal. 337; *Noe v. Splivalo*, 54 Cal. 207.

The same instrument may operate as the conveyance of one piece of property, and as a will devising another piece: *Adams v. Lansing*, 17 Cal. 629.

A will is regarded by the courts of England and the United States as a con-

veyance, and takes effect as a deed on proof of its execution, unless there be some express statute requiring it to be probated: *Castro v. Castro*, 6 Cal. 161.

A will is not a conveyance within the meaning of the act concerning conveyances which can be read in evidence upon the certificate of proof by a notary public: *Carpentier v. Gardiner*, 29 Cal. 160. See *Holladay v. Holladay*, 16 Or. 147.

Section 1271, Civil Code, repealed. Stats. 1873-74, p. 232.

§ 368. [1272.] Will, or Part thereof, Procured by Fraud. — A will, or part of a will, procured to be made by duress, menace, fraud, or undue influence may be denied probate; and a revocation procured by the same means may be declared void.

Montana. — Same. Comp. Stats., p. 380, sec. 434.

Utah. — Same. Comp. Laws, sec. 2648.

§ 369. [1273.] Separate Property of Married Women. — A married woman may dispose of all her separate estate by will, without the consent of her husband, and may alter or revoke the will in like manner as if she were single; her will must be executed and proved in like manner as all other wills.

Arizona. — See Rev. Stats., sec. 3232, under § 367, *ante*.

Idaho. — Same as California. Rev. Stats., sec. 5726.

Montana. — "A married woman may make a will in the same manner and with same effect as if she were sole, except that such will shall not, without the written consent of her husband, operate to deprive him of more than one third of her real estate or of more than one third of her personal estate." Comp. Stats., p. 380, sec. 435.

"That a married woman may make a will in the same manner and with the same effect as if she were sole, except that such will shall not, without the written consent of her husband, operate to deprive him of more than one third of her real estate or of more than one third of her personal estate." Comp. Stats., p. 1046, sec. 1447.

Nevada. — Same as California. Gen. Stats., sec. 3001.

Oregon. — "A married woman may, by will, dispose of any real estate held in her own right, subject to any rights which her husband may have as tenant by the curtesy." Hill's Laws, sec. 3068.

Utah. — Same as California. Comp. Laws, sec. 2649.

Washington. — "All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished." Gen. Stats., sec. 1409.

§ 370. [1274.] What may Pass by Will.—Every estate and interest in real or personal property, to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will, except as otherwise provided in sections fourteen hundred and one and fourteen hundred and two.

For sections 1401 and 1402, see §§ 404-406, *post*.

Arizona. — “Every person competent to make a last will and testament may thereby devise and bequeath all the estate, right, title, and interest in possession, reversion, or remainder, which he has, or at the time of his death shall have, of, in, or to any lands, tenements, hereditaments, or rents charged upon or issuing out of them, or shall have of, in, or to any personal property or any other property whatever, subject to the limitations prescribed by law.” Rev. Stats., sec. 3233.

Montana. — Same as California. Comp. Stats., p. 381, sec. 436.

“My estate,” in husband’s will; means estate subject to his testamentary disposition: *In re Mumford*, Myr. Prob. 133.

Death-benefits are not Subjects of Bequests. — The San Francisco Stock and Exchange Board, a voluntary unincorporated society, whose business is the purchase and sale of stock, provides in its constitution that there shall at all times exist a committee of three members or more, to be known as the “Trust Fund Committee,” whose duty it shall be to take charge of all moneys which may come into their hands to constitute a trust fund, to be used and applied by such committee as follows: Upon the death of a member, such committee shall pay out of said fund the sum of ten thousand dollars to such person or persons, object or objects, as may have been designated in writing by such deceased member; in case there be no such written disposition made, then to the widow of such member the sum of ten thousand dollars; in case there be no widow, but there be a child or children surviving such member, then to such child or children equally, share and share alike; if there be neither widow, child, or children surviving such deceased member, nor any written disposition made of the same, as heretofore provided, then there shall be no payment at all made. A member of said society died, leaving neither wife, child, or children, but left a will, in which, after providing for certain legacies, continues: “Should my es-

tate be worth more than sixty thousand dollars (\$60,000), and I now estimate it at \$80,000, including my seat in the San Francisco Stock and Exchange Board and the insurance on my life by said board, I give and devise to D. L. McDonald of San Francisco, the brother of my late dearly beloved wife, the sum of \$5,000. . . . The balance of my estate I desire paid over to my mother, Mrs. C. H. Swift, and by her distributed among the poor in any manner she may see proper.” It was held that the donation provided for in the said constitution is not a part of the estate of a deceased member of said society, and his executors are not entitled to receive it as a part of his estate; the decedent has no disposing power over it as part of his estate; the only power exercisable over it was that defined by the constitution of the society, and that was merely a power of appointment of some person or body to receive it as a thing distinct and separate from his estate. Undoubtedly, the testator might have exercised this power of appointment of a person to receive the fund and apply it to the purposes of his estate in his will, and he could have designated in that way his executors or any other persons; but the will does not name the executors, or creditors, or legatees, jointly or individually, as persons to receive payment of the “donation” for the purposes of his estate or otherwise; and for aught that appears in the case itself, the estate of the testator is

sufficient to meet all the special bequests of the will. That being so, the beneficiary fund did not pass, either by the special bequests or the residuary clause of the will, as part of the estate of the testator, and the will itself did not operate as a valid execu-

tion of the power of appointment. There being no survivors to take and no persons or objects designated, the trustees are not bound to pay at all: *Swift v. San Francisco Stock and Exchange Board*, 67 Cal. 567.

§ 371. [1275.] Who may Take by Will. — A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except corporations other than those formed for scientific, literary, or solely educational purposes, cannot take under a will, unless expressly authorized by statute.

Montana. — Same. Comp. Stats., p. 381, sec. 437.

Utah. — Same, except that after the word "literary," the following words are inserted: "Religious, charitable, benevolent." Comp. Laws, sec. 2640.

See § 406, *post*.

A school district may take by will: *In re Bulwer*, 59 Cal. 131.

A religious corporation which existed prior to the passage of the code, and which had a right to take by will under the law as it existed prior to 1873,

is not affected by the provisions of the above section, as this was a vested right: *In re Eastman*, 60 Cal. 308.

Bequest to religious corporation is void: *In re Wright*, Myr. Prob. 213.

§ 372. [1276.] Written Will, how to be Executed. — Every will, other than a nuncupative will, must be in writing, and every will, other than an olographic will and a nuncupative will, must be executed and attested as follows:—

1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto;

2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them, to have been made by him or by his authority;

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and

4. There must be two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the testator's request, and in his presence.

Arizona. — "Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator or by some other person by his direction and in his presence, and shall, if not wholly written

by himself, be attested by two or more credible witnesses above the age of fourteen years subscribing their names thereto in the presence of the testator." Rev. Stats., sec. 3234.

Idaho. — Same as California. Rev. Stats., sec. 5727.

Montana. — Same as California. Comp. Stats., p. 381, sec. 438.

Nevada. — "No will, except such nuncupative wills as are mentioned in this act, shall be valid unless it be in writing and signed by the testator and sealed with his seal, or by some person in his presence and by his express direction, and attested by at least two competent witnesses subscribing their names to the will in the presence of the testator." Gen. Stats., sec. 3002.

Oregon. — "Every will shall be in writing, signed by the testator, or by some other person under his direction, in his presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator." Hill's Laws, sec. 3069.

"Every person who shall sign the testator's name to any will by his direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request." Hill's Laws, sec. 3070.

Utah. — "Every will, other than a nuncupative will, must be in writing, and every will, other than an olographic and nuncupative will, must be executed and attested as follows: 1. It must be subscribed at the end thereof by the testator himself; 2. The subscription must be made in the presence of the attesting witnesses; 3. The testator must, at the time of subscribing the same, declare to the attesting witnesses that the instrument is his will; and 4. There must be two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the testator's request, in his presence and in the presence of each other." Comp. Laws, sec. 2651.

Washington. — Same as Oregon. Gen. Stats., secs. 1459, 1460.

If the statute is complied with substantially in the execution of a will, it is sufficient: *In re Johnson*, 57 Cal. 529.

The testator may direct one of the witnesses to his will to subscribe the testator's name thereto, and if he then publishes it as his will it will be valid: *In re Toomes*, 54 Cal. 509.

If a testator signs his will in the presence of a subscribing witness, who then signed it at his request, and then the scrivener, being present, asked the testator if the paper was his will, to which he, in the presence of the witness replied, "Yes"; it was held to be a sufficient declaration to the witness that the paper was the will of the testator: *In re Johnson*, 57 Cal. 529.

Will, requisites of, to entitle it to be admitted to probate: *Luper v. Werts*, 19 Or. 122.

To prove the attestation of a will, it must be shown that the witnesses who subscribed their names to it did

so, at the request of the testator; that they saw him sign it, heard him acknowledge it, or observed acts which unmistakably indicated that he had signed it. The acknowledgment, however, cannot be inferred from mere silence: *Luper v. Werts*, 19 Or. 122.

The proof of a will should not fail because the testimony of the subscribing witnesses thereto is insufficient to establish its execution, provided it can be proven by other competent evidence, or by circumstances clearly indicating its execution; but where such proof is not made, courts have no authority to adjudge the will effective: *Luper v. Werts*, 19 Or. 122.

Testator must request witnesses, in some form, to attest his will, though such request need not be in words: *In re Fusilier*, Myr. Prob. 40; *In re Crittenden*, Myr. Prob. 50.

Testator should call attention of subscribing witnesses to his will to

the fact that it had been signed by another by his authority: *In re Taney*, Myr. Prob. 210.

Signature to attested will: *In re Barker*, Myr. Prob. 78; *In re McCullough*, Myr. Prob. 76. **Of witness:** *In re Winslow*, Myr. Prob. 124.

No formal attesting clause is necessary to will: *In re Crittenden*, Myr. Prob. 50.

A will is valid although one of the three subscribing witnesses was alcalde of the place: *Panand v. Jones*, 1 Cal. 505; *Tevis v. Pilcher*, 10 Cal. 403.

Where a will was attested by two witnesses, and made before a person who was a "sindico," it was held that the fact that such person signed the instrument as "sindico" did not make him ineligible as a witness: *Tevis v. Pilcher*, 10 Cal. 403.

A clause in a will nominating executor is ineffectual if it is inserted after the signature: *In re McCullough*, Myr. Prob. 76.

Though the statute contains a provision that the will should be sealed, it is unnecessary to mention such seal in the instrument; nor is it necessary that the seal should remain, if by the act of sealing the condition imposed by the statute is performed: *In re Sticknoth*, 7 Nev. 223.

The legislature may waive the state's right to insist upon a technical informality in the execution of a will as against the just and equitable claims of the legatee. It may waive an escheat and order that unattested will may be admitted to probate, and there is nothing in the constitutional provision concerning the school fund (art. 11, sec. 3) to prevent it: *In re Sticknoth*, 7 Nev. 223.

Attesting witnesses to a will are not required for the purpose of protecting the contingent or possible right of property in the state by way

of escheat, but to prevent the setting up of fictitious wills: *In re Sticknoth*, 7 Nev. 223.

An objection to a will that it is not under seal cannot be urged for the first time in the supreme court, where the record does not purport to contain a copy of the original will, but only a translation thereof: *In re Sticknoth*, 7 Nev. 223.

The testator's mark is sufficient signing of a will: *Pool v. Buffum*, 3 Or. 438; *Moreland v. Brady*, 8 Or. 303, 312; and it is not necessary that the witness signing the testator's name to the mark should state that he did so at the testator's request: *Pool v. Buffum*, 3 Or. 438; *Moreland v. Brady*, 8 Or. 303, 312.

Undue influence: *Ross v. Conway*, 92 Cal. 432.

The opinion of the witness upon the question of capacity of testator is not admissible in evidence, upon the hearing before a jury of a petition to annul the probate of a will on the ground of the alleged incompetency of the testator: *In re Taylor*, 92 Cal. 64; but it is competent for a witness to give such opinion, in connection with the facts upon which the opinion is based: *In re Taylor*, 92 Cal. 64.

Where a jury finds that the deceased is incompetent at the time of the execution of the will, and also that he was induced to execute it because of fraudulent representations of the legatee, and it appears that the court erred in admitting the opinion of the witness as to the capacity of deceased to make a will, upon the issue of competency, it cannot be said that the jury was not also influenced by such testimony upon their finding on the issues as to undue influence of the false representations, and for such error the judgment must be reversed: *In re Taylor*, 92 Cal. 64.

Form No. 239.—Will.

In the name of God, amen. I, —, of the — county of —, state of —, of the age of — years, and being of sound and disposing mind, and not under any restraint, or the influence or representation of any person whatever, do make, publish, and declare this my last will and testament, in manner following; that is to say:—

First. I direct that my body be decently buried, without undue ceremony or ostentation, but with proper regard to my station and condition in life and the circumstances of my estate.

Second. I direct that my executors hereinafter named, as soon as they have sufficient funds in their hands, pay my funeral expenses and the expenses of my last sickness, and the allowance made to my family.

Third. I give and bequeath to my wife, —, the sum of five thousand dollars, to my son, —, the sum of five thousand dollars, and to my daughter, —, the sum of four thousand five hundred dollars; which said several legacies or sums of money I direct and order to be paid to the said respective legatees out of the proceeds of the sales of the personal property owned by me at the time of my death, after first paying and fully satisfying out of said proceeds all my just debts and the expenses of administration, should the balance of said proceeds suffice for that purpose, and if not, then I direct and order said legacies or sums of money to be paid to the said respective legatees *pro rata*, in like proposition.

Fourth. I give and devise to my said son, —, his heirs and assigns, all that certain lot, piece, or parcel of land situate, lying, and being in the — county of —, state of —, bounded and described as follows, to wit: Commencing at the northeast corner of — and — streets; running thence northerly along the easterly line of said — street fifty (50) feet; thence, at right angles, easterly, fifty (50) feet; thence at right angles, southerly, fifty (50) feet, to the northerly line of said — street, and thence along said northerly line of said — street, westerly, fifty (50) feet, to said point of commencement; together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining, to have and to hold the premises above described, to the said —, his heirs and assigns forever.

Fifth. I give and devise all the rest, residue, and remainder of any real estate, of every name and nature whatsoever, owned by me at the time of my death, to my said wife, —, and my said daughter, —, to be divided equally between them, share and share alike.

Sixth. I give and bequeath all the rest, residue, and re-

mainder of my personal estate, goods, and chattels, of whatever kind or nature, owned by me at the time of my death, to my said wife, —.

Lastly. I hereby appoint — and —, of said — county of —, the executors of this my last will and testament; hereby revoking all former wills by me made.

In witness whereof, I have hereunto set my hand and seal, this — day of —, in the year of our Lord one thousand eight hundred and —. — [L. S.]

The foregoing instrument, consisting of two pages besides this, was, at the date thereof, by the said —, signed and sealed and published as and declared to be his last will and testament, in presence of us, who, at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto. —, residing at —.

—, residing at —.

Form No. 240.— Short Form of Will.

In the name of God, amen. I, —, of the county —, state of —, being of the age of — years, and being of a sound and disposing mind and memory, do make, publish, and declare this to be my last will and testament.

1. I hereby revoke all former wills by me made;

2. I nominate and appoint — as the executor of my said will and testament;

3. I give and bequeath, etc.

In witness whereof, I have hereunto set my hand and seal this — day of —, A. D. 18—. — [SEAL]

We, the undersigned, hereby certify that we were present and saw —, the testator named in the foregoing will, sign, seal, and execute the same at the date thereof, and he thereupon declared to us that said document was his last will and testament, and requested us to subscribe our names thereto as witnesses, and thereupon we, in his presence and in the presence of each other, then and there subscribed our names as witnesses to said will.

—, a Resident of the City of —, California.

—, a Resident of the City of —, California.

§ 373. [1277.] Definition of an Olographic Will.—

An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed.

Arizona. — “Where the will is wholly written by the testator, the attestation of the subscribing witnesses, as required by the preceding section, may be dispensed with.” Rev. Stats., sec. 3235.

Idaho. — Same as California. Rev. Stats., sec. 5728.

Montana. — Same as California. Comp. Stats., p. 381, sec. 439.

Utah. — Same as California, with these words added: “Such wills may be proven in the same manner as other private writings.” Comp. Laws, sec. 2652.

Olographic will made before passage of act authorizing it is valid if testator died subsequently to the passage of the act: *In re Barker*, Myr. Prob. 78; *In re McCloud*, Myr. Prob. 23.

Signature to olographic wills: *In re Barker*, Myr. Prob. 78; *In re Donoho*, Myr. Prob. 140; *In re Johnson*, Myr. Prob. 5.

Olographic will could not be made prior to adoption of code: *In re McCloud*, Myr. Prob. 23.

Letter dictated, but not written, by testator cannot be admitted to probate as a portion of an olographic will: *In re Shillaber*, 15 Pac. Rep. 453. Such letter does not form a part of such will so as to invalidate the will: *In re Cahill*, 74 Cal. 52.

What Amounts to an Olographic Will. — Decedent executed a deed of gift to his sister, but did not deliver it. He then wrote to his sister, telling her of the fact of the execution, and inclosing a copy of the deed in his own handwriting. In the letter he said: “We all know life is uncertain, and we don’t know the moment we may be called away. I therefore want you to know you are provided for, under any circumstances. My intention is to provide for you while I live, and if it should please God to call me away, you will have your own property to depend on, sufficient to make you independent while you live.” The letter and copy of the deed were offered together for

probate as the will of decedent. Held, that they constitute a good olographic will when taken together, being wholly written by the testator, and dated and signed by him, and the words above showing the *animus testandi*; but that when taken separately, neither is sufficient as a will, nor is the original deed, which was neither written by the testator, nor dated, nor delivered, admissible as such: *In re Skerritt*, 67 Cal. 585.

An olographic will must be wholly written, dated, and signed by the testator: *In re Martin*, 58 Cal. 530; *In re Rand*, 61 Cal. 468; *In re Billings*, 64 Cal. 427. A date is essential to its validity. A recital in it that the testator is sixty years of age does not constitute a date: *In re Martin*, 58 Cal. 530.

A will made and executed by a testator in accordance with the above section is not invalid because made and executed by him anterior to the time when such section became operative, if the testator did not die until the statute referred to had gone into effect: *In re Learned*, 70 Cal. 140.

The following instrument, from the circumstances attending its execution, was held to be testamentary in its character, and therefore entitled to be admitted to probate: “Mayfield Grange, Tuesday, June 23, 1874. Dear Old Nance, — I wish to give you my watch, two shawls, and also five thousand dollars. Your old friend, E. A. Gordon”: *Clark v. Ransom*, 50 Cal. 595.

§ 374. [1278.] Witness to Add Residence. — A witness to a written will must write, with his name, his place of

residence; and a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will.

Idaho. — Same. Rev. Stats., sec. 5729.

Montana. — Same. Comp. Stats., p. 381, sec. 440.

Utah. — Same as California, except that second clause of the first sentence is omitted. Comp. Laws, sec. 2653.

No formal attesting clause is necessary to will: *In re Crittenden*, Myr. Prob. 50. **A witness may attest the mark of his co-witness to a will:** *In re Dearry*, Myr. Prob. 202.

§ 375. [1279.] **Mutual Will.** — A conjoint or mutual will is valid, but it may be revoked by any of the testators, in like manner with any other will.

Montana. — Same. Comp. Stats., p. 381, sec. 441.

Utah. — Same. Comp. Laws, sec. 2654.

§ 376. [1280.] **Competency of Subscribing Witness.** — If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency, from whatever cause it may arise, does not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved.

Idaho. — Same. Rev. Stats., sec. 5730.

Montana. — Same. Comp. Stats., p. 381, sec. 442.

Utah. — Same. Comp. Laws, sec. 2655.

§ 377. [1281.] **Conditional Will.** — A will the validity of which is made by its own terms conditional may be denied probate, according to the event, with reference to the condition.

Montana. — Same. Comp. Stats., p. 382, sec. 443.

Utah. — Same. Comp. Laws, sec. 2656.

§ 378. [1282.] **Gifts to Witnesses Void — Creditors Competent Witness.** — All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, are void, unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts

does not prevent his creditors from being competent witnesses to his will.

Arizona. — "Should any person be a subscribing witness to a will, and be also a legatee or devisee therein, if the will cannot be otherwise established, such bequest shall be void, and such witness shall be allowed and compelled to appear and give testimony in like manner as if no such bequest had been made. But if in such case the witness would have been entitled to a share of the estate of the testator or testatrix, had there been no will, he or she shall be entitled to so much of such share as shall not exceed the value of the bequest to him or her in the will." Rev. Stats., sec. 3247.

"In the case provided for in the preceding section, such will may be proved by the evidence of the subscribing witnesses, corroborated by the testimony of one or more disinterested and credible persons, to the effect that the testimony of such subscribing witnesses necessary to sustain the will is substantially true, in which event the bequest to such subscribing witnesses shall not be void." Rev. Stats., sec. 3248.

Montana. — Same as California. Comp. Stats., p. 382, sec. 444.

Nevada. — Same as California. Gen. Stats., sec. 3003.

"If any person has attested or shall attest the execution of any will to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than or except charges in lands, tenements, or hereditaments for the payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or any person claiming under him, be void, and such person shall be admitted as a witness to the execution of such will." Hill's Laws, sec. 3085.

"If the execution of such will be attested by a sufficient number of other competent witnesses, as required by this act, then such devise, legacy, interest, estate, gift, or appointment shall be valid." Hill's Laws, sec. 3087.

"If by any will any real estate be charged with any debt, and any creditor whose debt is so charged has attested the execution of such will, every such creditor shall be admitted as a witness to the execution of such will." Hill's Laws, sec. 3088.

"If any person has attested or shall attest the execution of any will to whom any legacy or bequest is thereby given, and such person, before giving testimony concerning the execution of such will, shall have been paid or have accepted or released, or shall refuse to accept, such bequest or legacy upon tender thereof, such person shall be admitted as a witness to the execution of such will." Hill's Laws, sec. 3089.

"The credit of such witness shall be subject to the consideration of the court or jury." Hill's Laws, sec. 3090.

"If any legatee or devisee who has attested or shall attest the execution of any will shall have died or die in the lifetime of the testator, or before he shall have received or released the legacy or bequest so given to him, and before he shall have refused to receive such legacy or bequest on a tender made thereof, such legatee or devisee shall be deemed a legal witness to the execution of such will." Hill's Laws, sec. 3091.

"No person to whom any estate, gift, or appointment shall be given or made, which is hereby declared to be null and void, or who shall have refused to receive such legacy or bequest on tender made, and who shall have been examined as a witness concerning the execution of such will, shall, after he shall have been so examined, demand or receive, except as provided in section 3086 [§ 379, *post*], any profit or benefit of or from any such estate, interest, gift, or appointment so given or made to him by any such will, or demand, receive, or accept from any person any such legacy or bequest, or any satisfaction or compensation for the same." Hill's Laws, sec. 3092.

Utah. — Same as California. Comp. Laws, sec. 2657.

Washington. — Same as California. Gen. Stats., sec. 1471.

A witness to a will is not disqualified thereby from taking under the will a trust estate in which he has no beneficial interest: *Hogan v. Wyman*, 2 Or. 304.

§ 379. [1283.] Witness Who is a Devisee. — If a witness, to whom any beneficial devise, legacy, or gift, void by the preceding action, is made, would have been entitled to any share of the estate of the testator, in case the will should not be established, he succeeds to so much of the share as would be distributed to him, not exceeding the devise or bequest made to him in the will; and he may recover the same of the other devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.

Arizona. — See Rev. Stats., sec. 3247, under last section.

Montana. — Same as California. Comp. Stats., p. 382, sec. 445.

Oregon. — Same as California. Hill's Laws, sec. 3086.

Utah. — Same as California. Comp. Laws, sec. 2658.

Washington. — Same as California. Gen. Stats., sec. 1471.

Section 1284, Civil Code, repealed. Stats. 1884, p. 242.

§ 380. [1285.] What Valid as Will. — No will made out of this state is valid as a will in this state, unless executed according to the provisions of this chapter.

Montana. — Same. Comp. Stats., p. 382, secs. 446, 447.

Oregon. — Same, except that where personal estate is bequeathed, it may also be executed according to the law of the country "in which the will shall be proved." Hill's Laws, sec. 3082.

Utah. — Same as California. Comp. Laws, sec. 2659.

Our statute of wills not only fails to require wills executed before its passage to be probated, but an examination of its different sections shows that it was not a *casus omissus*, and that the legislature actually intended to exclude them from the oper-

ation of the statute altogether, leaving their validity to rest upon the laws under which they were made: *Grimes v. Norris*, 6 Cal. 624.

A will made in Texas operating upon property there must be interpreted by the law of that state. To

that law reference must be had to determine the capacity of the testator, the extent of his power of disposition, and the conditions upon which the powers of alienation vested in the guardian of his children, appointed by the will, is to be exercised: *Norris v. Harris*, 15 Cal. 226.

Section 1286, Civil Code, repealed. Stats. 1874, p. 232.

§ 381. [1287.] Republication by Codicil.—The execution of a codicil, referring to a previous will, has the effect to republish the will as modified by the codicil.

See *Payne v. Payne*, 18 Cal. 291.

Montana. — Same. Comp. Stats., p. 382, sec. 448.

Utah. — Same. Comp. Laws, sec. 2660.

Codicil must be offered for probate within a year after the probate of the original will: *In re Adsit*, Myr. Prob. 266.

§ 382. [1288.] Nuncupative Will, how to be Executed.—A nuncupative will is not required to be in writing, nor to be declared or attested with any formalities.

Montana. — Same. Comp. Stats., p. 382, sec. 449.

Utah. — Same. Comp. Laws, sec. 2661.

§ 383. [1289.] Requisites of a Valid Nuncupative Will.—To make a nuncupative will valid, and to entitle it to be admitted to probate, the following requisites must be observed:—

1. The estate bequeathed must not exceed in value the sum of one thousand dollars;

2. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator, at the time, to bear witness that such was his will, or to that effect;

3. The decedent must, at the time, have been in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear, or peril of death; or the decedent must have been, at the time, in expectation of immediate death from an injury received the same day.

Arizona. — “Any person who is competent to make a last will and testament, under section 1 [Rev. Stats., sec. 3232; § 367, *ante*], may dispose of his property by a nuncupative will under the conditions and limitations hereinafter prescribed.” Rev. Stats. sec. 3237.

“No nuncupative will shall be established unless it be made in the time of the last sickness of the deceased; nor when the value exceeds fifty dollars, unless it be proved by three credible witnesses that the testator called on some person to take notice or bear testimony that such is his will, or words of like import.” Rev. Stats., sec. 3238.

Montana. — Same as California. Comp. Stats., p. 382, sec. 450.

Nevada. — “No nuncupative or verbal will shall be good where the estate bequeathed exceeds the value of one thousand dollars, nor unless the same be proved by two witnesses who were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid some one present to bear witness that such was his will, or words of like import, nor unless such nuncupative will was made at the time of the last sickness of the deceased.” Gen. Stats., sec. 3004.

Oregon. — “Any mariner at sea, or soldier in the military service, may dispose of his wages or other personal property as he might have done by common law, or by reducing the same to writing.” Hill’s Laws, sec. 3079.

Utah. — Same to subdivision 3, which is as follows: “3. The decedent must have been at that time in expectation of immediate death from an injury or casualty happening or occurring within twenty-four hours previous to the making of such nuncupative will.” Comp. Laws, sec. 2662.

Washington. — “No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars, unless the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator, at the time of pronouncing the same, did bid some person present to bear witness that such was his will, or to that effect, and such nuncupative will was made at the time of the last sickness and at the dwelling-house of the deceased, or where he had been residing for the space of ten days or more, except where such person was taken sick from home and died before his return. Nothing herein contained shall prevent any mariner at sea or soldier in the military service from disposing of his wages or other personal property by nuncupative will.” Gen. Stats., sec. 1469.

Probate of Nuncupative Wills: See § 36, *ante*.

§ 384. [1290.] Proof of Nuncupative Wills. — No proof must be received of any nuncupative will, unless it is offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, were reduced to writing within thirty days after they were spoken.

Arizona. — “After six months have elapsed from the time of speaking the pretended testamentary words, no testimony shall be received to prove a nuncupative will, unless the testimony, or the substance thereof, shall have been committed to writing within six days after making the will.” Rev. Stats., sec. 3240.

Montana. — Same. Comp. Stats., p. 383, sec. 451.

Nevada. — “No proof shall be received of any nuncupative will unless it be offered within three months after speaking the testamentary words.” Gen. Stats., sec. 3005.

Oregon. — Same as California. Hill’s Laws, sec. 3080.

Utah. — Same as California. Comp. Laws, sec. 2663.

Washington. — Same, except that all after the word “thereof” is omitted, and the following substituted therefor: “Be first committed to writing, and a

citation issued to the widow or next of kin of the deceased, that they may contest the will, if they think proper." Gen. Stats., sec. 1470.

Probate of Nuncupative Wills: See § 36, *ante*.

§ 385. [1291.] Probate of Nuncupative Wills. — No probate of any nuncupative will must be granted for fourteen days after the death of the testator, nor must any nuncupative will be at any time proved, unless the testamentary words, or the substance thereof, be first committed to writing, and process issued to call in the widow, or other persons interested, to contest the probate of such will, if they think proper.

Arizona. — "No nuncupative will shall be proved within fourteen days after the death of the testator, nor until those who would have been entitled by inheritance, had there been no will, have been summoned to contest the same, if they desire to do so." Rev. Stats., sec. 3239.

"Any soldier in actual military service, or any mariner or seaman being at sea, may dispose of his chattels without regard to the provisions of this act." Rev. Stats., sec. 3241.

Montana. — Same as California. Comp. Stats., p. 383, sec. 452.

Nevada. — "No probate of any nuncupative will shall be granted for fourteen days after the death of the testator, nor shall any nuncupative will be at any time proved unless the testamentary words, or the substance thereof, be first committed to writing by the probate judge, and process be issued to call in the widow, should she be a resident of the territory, or other person or persons interested as heirs of the testator, residing in the territory, to contest the probate of such will, if they think proper." Gen. Stats., sec. 3006.

Oregon. — Same as California. Hill's Laws, sec. 3081.

Washington. — Same as California. Gen. Stats., sec. 1470, under last section.

§ 386. [1292.] Written Will, how Revoked. — Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than, —

1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or

2. By being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction.

Arizona. — "No will in writing made in conformity with the preceding sections, nor any clause thereof or devise therein, shall be revoked except by a subsequent will, codicil, or declaration in writing executed with like formalities, or by the testator destroying, canceling, or obliterating the same, or causing it to be done in his presence; *provided*, that if after making a will the testator marries, and the wife survive the testator, the will shall be revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to revoke such provisions, and no other evidence to rebut the presumption of revocation must be received." Laws 1891, pp. 142, 143, sec. 1, amending Rev. Stats., sec. 3236.

Idaho. — Same as California. Rev. Stats., sec. 5731.

Montana. — Same as California. Comp. Stats., p. 383, sec. 453.

Nevada. — "No will in writing shall be revoked unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence or by his direction, or by some other will or codicil in writing, executed as prescribed by this act; but nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." Gen. Stats., sec. 3007.

Utah. — Same as California. Comp. Laws, sec. 2664.

Washington. — Same as California. Gen. Stats., sec. 1461.

When an intent to cancel a single clause in a will by erasure, made by testator, is shown, the will should be proved without such clause: *In re Chinmark*, Myr. Prob. 128.

A will is revoked by operation of law whenever new moral and testamentary duties arise subsequent to its execution: *Morgan v. Ireland*, 1 Idaho, 786.

§ 387. [1293.] Evidence of Revocation. — When a will is canceled or destroyed by any other person than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses.

Idaho. — Same. Rev. Stats., sec. 5732.

Montana. — Same. Comp. Stats., p. 383, sec. 454.

Utah. — Same. Comp. Laws, sec. 2665.

Section 1294, Civil Code, repealed. Stats. 1874, p. 233.

§ 388. [1295.] Revocation of Duplicate. — The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates.

Idaho. — Same. Rev. Stats., sec. 5733.

Montana. — Same. Comp. Stats., p. 383, sec. 455.

Utah. — Same. Comp. Laws, sec. 2666.

§ 389. [1296.] Revocation by Subsequent Will. — A prior will is not revoked by a subsequent will, unless the

latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual, so far as consistent with the provisions of the subsequent will.

Montana. — Same. Comp. Stats., p. 383, sec. 456.

Utah. — Same. Comp. Laws, sec. 2667.

The validity of a will cannot be affected by any prior will: *In re Gharkey*, 57 Cal. 280.

A second will altering a former one need not state in terms that it is intended thereby to alter such former will: *Clarke v. Ransom*, 50 Cal. 595.

§ 390. [1297.] Antecedent not Revived by Revocation of Subsequent Will. — If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation, or revocation, the first will is duly republished.

Idaho. — Same. Rev. Stats., sec. 5734.

Montana. — Same. Comp. Stats., p. 384, sec. 457.

Nevada. — Same. Gen. Stats., sec. 3008.

Oregon. — Same. Hill's Laws, sec. 3078.

Utah. — Same. Comp. Laws, sec. 2668.

Washington. — Same. Gen. Stats., sec. 1468.

§ 391. [1298.] Revocation by Marriage and Birth of Issue. — If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received.

See *Sanders v. Simcich*, 65 Cal. 50.

Idaho. — Same. Rev. Stats., sec. 5735.

Montana. — Same. Comp. Stats., p. 384, sec. 458.

Oregon. — "If, after making a will disposing of the whole estate of the testator, such testator shall marry and die, leaving issue by such marriage living at the time of his death, or shall leave issue of such marriage born to him after his death, such will shall be deemed revoked, unless provision shall

have been made for such issue by some settlement, or unless such issue shall be provided for in the will, and no evidence shall be received to rebut the presumption of such revocation." Hill's Laws, sec. 3071.

Utah. — Same as California. Comp. Laws, sec. 2669.

§ 392. [1299.] Effect of Marriage of a Man on his Will. — If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received.

Idaho. — Same. Rev. Stats., sec. 5736.

Montana. — Same. Comp. Stats., p. 384, sec. 459.

Nevada. — Same, except that the following words are omitted: "Provision has been made for her by marriage contract, or unless:" Gen. Stats., sec. 3009.

Utah. — Same as California. Comp. Laws, sec. 2670.

Washington. — Same as California. Gen. Stats., sec. 1462.

Revocation of will by marriage:
See note to *Graves v. Sheldon*, 15 Am. Dec. 659.

Where an antenuptial will is shown to have been revoked by marriage, and no marriage contract is proved, the power of the court is limited to denying probate to the will, and determining who has a right to administer upon the estate. It has no jurisdiction to inquire into any facts affecting the consideration, validity, or operation of a deed of separation between the testator and his wife: *Corker v. Corker*, 87 Cal. 643.

The term "marriage contract," as used in the above section, refers to and designates only such a contract or settlement between husband and wife as expressly purports in its terms to be a "marriage contract," and to make provisions for the wife in lieu of a testamentary provision for her, and does not include a "post-nuptial" agreement, which merely purports to settle property rights between them in view of a separation: *Corker v. Corker*, 87 Cal. 643.

When an antenuptial will is offered for probate, the surviving wife need only show the subsequential marriage, in order to defeat the probate; and the burden is then cast upon the proponent of the will, if he relies upon a marriage contract to prevent a revocation of the will, to prove the contract, and show by its terms that it purports to make provisions for the wife, and that such provisions were intended to take the place of a testamentary provision for her: *Corker v. Corker*, 87 Cal. 643.

Upon the contest of an antenuptial will by a surviving wife, no evidence can be adduced by the proponent of the will respecting what is claimed to be a marriage contract, other than the instrument itself, with proof of its execution if denied; and if the instrument does not purport upon its face to be a marriage contract, the court cannot receive any other evidence that such was the intention of the parties: *Corker v. Corker*, 87 Cal. 643.

§ 393. [1300.] Effect of a Marriage of a Woman on her Will. — A will, executed by an unmarried woman, is

revoked by her subsequent marriage, and is not revived by the death of her husband.

Idaho. — Same. Rev. Stats., sec. 5737.

Montana. — Same. Comp. Stats., p. 384, sec. 460.

Nevada. — Same. Gen. Stats., sec. 3010.

Oregon. — "A will executed by an unmarried woman is revoked by her subsequent marriage." Hill's Laws, sec. 3072.

§ 394. [1301.] Contract of Sale not a Revocation.

— An agreement made by a testator for the sale or transfer of property disposed of by a will previously made does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession.

Idaho. — Same. Rev. Stats., sec. 5738.

Montana. — Same. Comp. Stats., p. 384, sec. 461.

Nevada. — "A bond, covenant, or agreement, made by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, but such property shall pass by the devise or bequest, subject to the same remedies on such bond, covenant, or agreement, for the specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, if the same had descended to them." Gen. Stats., sec. 3011.

Oregon. — Same as Washington, *post.* Hill's Laws, sec. 3073.

Utah. — Same as California, with these words, in the last clause, omitted: "Against the devisees or legatees, as might be had." Comp. Laws, sec. 2671.

Washington. — Same as Nevada, except that the words "for a valuable consideration" are interpolated between the words "made" and "by"; and also the words "or his next of kin" are interpolated between the words "testator" and "if." Gen. Stats., sec. 1463.

§ 395. [1302.] Mortgage not a Revocation of Will.

— A charge or encumbrance upon any estate, for the purpose of securing the payment of money or the performance of any covenant or agreement, is not a revocation of any will relating to the same estate which was previously executed; but the devise and legacies therein contained must pass, subject to such charge or encumbrance.

Idaho. — Same. Rev. Stats., sec. 5739.

Montana. — Same. Comp. Stats., p. 384, sec. 462.

Nevada. — Same. Gen. Stats., sec. 3012.

Oregon. — Same. Hill's Laws, sec. 3074.

Utah. — Same. Comp. Laws, sec. 2672.

Washington. — Same. Gen. Stats., sec. 1464.

§ 396. [1303.] **Conveyance, when not a Revocation.** — A conveyance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession.

Idaho. — Same. Rev. Stats., sec. 5740.

Montana. — Same. Comp. Stats., p. 384, sec. 463.

Utah. — Same. Comp. Laws, sec. 2673.

See § 394, *ante*, §§ 397, 404, 421, *post*.

Ademption of Legacies: See § 442, *post*.

The will operates only upon belonged to him at his death: so much of the land of the tes- *Bruck v. Tucker*, 32 Cal. 425.
tator as legally and equitably

§ 397. [1304.] **What is a Revocation.** — If the instrument by which an alteration is made in the testator's interest in a thing previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect.

Idaho. — Same. Rev. Stats., sec. 5741.

Montana. — Same. Comp. Stats., p. 385, sec. 464.

Utah. — Comp. Laws, sec. 2674.

§ 398. [1305.] **Revocation of Codicils.** — The revocation of a will revokes all its codicils.

Idaho. — Same as California. Rev. Stats., sec. 5742.

Montana. — Same. Comp. Stats., p. 385, sec. 465.

Utah. — Same. Comp. Laws, sec. 2675.

§ 399. [1306.] **After-born Child Unprovided for.** — Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal

property that he would have succeeded to if the testator had died intestate.

Arizona. — “When a testator shall have children born, and his wife *en-ciente*, the posthumous child, if unprovided for by settlement, and pretermitted by his last will and testament, shall succeed to the same portion of the father's estate as such child would have been entitled to if the father had died intestate, toward which portion the devisees and legatees shall contribute proportionately out of the parts devised and bequeathed to them by such last will and testament.” Rev. Stats., sec. 3242.

“If a testator or testatrix, having a child or children born at the time of making his or her last will and testament shall, at his or her death, leave a child or children born after the making of such last will and testament, the child or children so after-born and pretermitted shall, unless provided for by settlement, succeed to the same portion of the father's or mother's estate as they would have been entitled to if the father or mother had died intestate, toward raising which portion the devisees and legatees shall contribute proportionately out of the parts devised and bequeathed to them by such last will and testament in the same manner as is provided in section 11 [last section, *supra.*]” Rev. Stats., sec. 3243.

“Every last will and testament made when the testator had no child living, wherein any child he might have is not provided for or mentioned, if at the time of his death he shall leave a child, or leave his wife *enceinte* of a child which shall be born, shall have no effect during the life of such after-born child, and shall be void unless the child die without having been married, and before he or she shall have attained the age of twenty-one.” Rev. Stats., sec. 3244.

“Under the name of ‘children,’ as used in this act, are included descendants of whatever degree they may be, it being understood they are only counted for the child they represent.” Rev. Stats., sec. 3245.

“The husband or wife may, by last will and testament, give to the survivor of the marriage the power to keep his or her separate property together until each of the several heirs shall become of lawful age, and to manage and control the same under such restrictions as may be imposed by such will; *provided*, the surviving husband or wife is the father or mother, as the case may be, of the minor heirs; and *provided further*, that any child or heir entitled to any part of said property shall, at any time upon becoming of age, entitled to be receive his distributive portion of said estate.” Rev. Stats., sec. 3249.

“Should any father or mother, in consequence of the idleness, dissipation, or extravagance of his or her child or children, apprehend that his, her, or their estate will be squandered if left to their management or control, it shall be lawful for such father or mother, by last will and testament, to leave such estate in the hands of trustees, to be appointed by said will, which trustees shall have the entire management and control of said estate, the profit of which, after deducting expenses of said management, shall be paid over to the child or children entitled to the same for his, her, or their maintenance and support; and it shall be lawful, at any time, for the court of probate in the county where

such estate may be situated, or where such trustee or trustees may reside, to take cognizance of the same, and to remove such trustee or trustees from the management of the same; *provided*, it shall be made to appear that such estate is being wasted or improperly managed; and to appoint other trustees for the management thereof, taking bond and security from such trustees in a sum at least equal to the value of such estate for the faithful performance of the trust; and if the child or children entitled to such estate, or any part thereof, shall at any time make it appear to the satisfaction of said court that the causes for leaving said estate in trust no longer exist, and that there is no danger of its being squandered by idleness, dissipation, or extravagance, it shall be the duty of said court to dissolve said trust, and place the said estate in the hands of the person or persons who would have been entitled to the same had such trust not been created." Rev. Stats., sec. 3252.

Idaho. — Same as California. Rev. Stats., sec. 5743.

Montana. — Same as California. Comp. Stats., p. 385, sec. 466.

Nevada. — "When any child shall have been born after the making of its parent's will, and no provision shall be made for him or her therein, such child shall have the same share in the estate of the testator as if the testator had died intestate, unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child." Gen. Stats., sec. 3013.

Oregon. — "If any person make his last will and die, leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, so far as shall regard such child or children, or their descendants not provided for, shall be deemed to die intestate; and such child or children or their descendants shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate; and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part." Hill's Laws, sec. 3075.

Utah. — Same as California. Comp. Laws, sec. 2676.

Washington. — Same as Oregon. Gen. Stats., sec. 1465.

A will, providing only for widow of the deceased, and omitting to provide for his children, and failing to show affirmatively that the omission to provide for them was intentional, does not deprive them of their legal right to inherit the same as if the father had died intestate, and they become tenants in common with the widow in all the real property of the deceased subject to administration, their proportion depending upon whether the property was community property or the separate property of the decedent: *In re Grider*, 81 Cal. 571.

Naming heirs of the testator in his will, without making any bequest or devise to them, is sufficient

evidence that the testator intended to omit them: *Payne v. Payne*, 18 Cal. 291.

Posthumous child: *In re Buchanan*, 8 Cal. 507.

Under section 3075, Hill's code, supra, a testator is deemed to have died intestate as to any child or children, or the descendants of any such child or children, in case of their death, not named or provided for, although born after the making of such will or the death of the testator: *Northrop v. Marquam*, 16 Or. 173.

Pretermitted Children — Effect of Will. — Under the above and the next sections, providing that where a testator omits to provide, in his will,

for any of his children, unless it appears that the omission was intentional, the child succeeds to the same portion of the estate of the testator as he would have received if the testator had died intestate, the child succeeds immediately, by operation of law, to the same portion of the real property as if no will had been made, the testa-

tor being regarded as dying intestate as to that portion; and every provision of the will directly or indirectly attempting to dispose of such portion of the estate, except for the discharge of the decedent's debts or other charges of administration, is inoperative as against the child: *Smith v. Olmstead*, 88 Cal. 582.

§ 400. [1307.] Children or Issue of Children of Testator Unprovided for.—When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section.

Idaho.—Same. Rev. Stats., sec. 5744.

Montana.—Same. Comp. Stats., p. 385, sec. 467.

Nevada.—Same. Gen. Stats., sec. 3014.

Oregon.—Hill's Laws, sec. 3075, under last section.

Utah.—Same. Comp. Laws, sec. 2677.

See *In re Garaud*, 35 Cal. 336.

If a testator in his will devise his property to his grandson, and he has children living, it does not show, as matter of construction of the will, that he intentionally omitted to provide for the latter: *Bush v. Lindsey*, 44 Cal. 121.

A testator in disposing of his property "to my children," and proceeded to name them and the portion devised to each, but omitted any special mention of a devise to the children of a deceased daughter, it was held that the use of the word "children" did not indicate a deliberate purpose to exclude the children of a deceased daughter, and that they were entitled to a full share of the estate as if the deceased had died intestate: *In re Utz*, 43 Cal. 200.

An illegitimate child unintentionally omitted from its mother's will is entitled to share in the estate in like manner as if legitimate: *In re Wardell*, 57 Cal. 484.

Where a child has been omitted unintentionally in a will, he inherits the same as if no will had been made, and will take by descent, and not by

purchase: *Pearson v. Pearson*, 45 Cal. 609.

If a testator leaves no wife nor any issue, except a child for whom he failed to provide in his will, without showing that this omission was intentional, the pretermitted child will take the whole estate as if the testator had died intestate: *Pearson v. Pearson*, 45 Cal. 609.

The object of this section is, not to compel parents to make actual beneficial provision for their children, but to prevent the consequences of oversight, and to produce intestacy only when the child is unknown or forgotten, and thus unintentionally omitted. Where a married woman, after her husband's death, makes a will, referring to and making her husband's will a part of her own, and the names of all the children appear in the husband's will, this is a compliance with the requisite that the will must mention the names of all the children, etc.: *Gerrish v. Gerrish*, 8 Or. 351.

The will may be valid and effectual as to all the children named or provided for therein, but as to those

not named or provided for, it is no will, and such child or children will take under the law of descents, in all respects as if no will had been made: *Northrop v. Marquam*, 16 Or. 173.

A child *in ventre sa mere*, not named or provided for in its father's will, takes by inheritance its proportionate interest in its father's estate: *Northrop v. Marquam*, 16 Or. 173.

Parol evidence is admissible to show that a testator, in omitting in his will any mention of a child as a beneficiary under it, did so by design, and not by accident: *Covlam v. Doull*, Sup. Ct. Utah, Feb. 6, 1886.

Evidence of declarations of testator as to his intention to omit any of his children from his will is not admissible. In order to disinherit a child whose name is omitted from the will, it is not sufficient merely to state that the whole of his property is devised to his wife, but the words of the will must show that the testator had

the child in mind, and must indicate directly, or by implication equally as strong, that he intended to omit such child from the will: *In re Stevens*, 83 Cal. 322.

Where a testator intentionally omits to provide in his will for a daughter, who was alive at the making and publishing of the will, and who was disinherited by its terms, the children of such daughter, who are not mentioned in the will, have no rights to the property as heirs, under section 1307 of the Civil Code, and obtain none by their mother's death before the death of the testator. That section does not protect any grandchildren from the effects of mere omission from the will, except those who were the issue of a child who was deceased at the time the will was made, and who were then presumptive heirs at law of the testator: *In re Barker*, 86 Cal. 441.

§ 401. [1308.] Share of After-born Child, out of What Estate to be Paid.—When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child, or the issue of a child, omitted in the will, as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy, or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

Idaho. — Same. Rev. Stats., sec. 5745.

Montana. — Same. Comp. Stats., p. 385, sec. 468.

Nevada. — Same. Gen. Stats., sec. 3015.

Utah. — Same. Comp. Laws, sec. 2678.

§ 402. [1309.] Advancement During Lifetime of Testator.—If such children, or their descendants, so unprovided for, had an equal proportion of the testator's estate

bestowed on them in the testator's lifetime, by way of advancement, they take nothing in virtue of the provisions of the three preceding sections.

Idaho. — Same. Rev. Stats., sec. 5746.

Montana. — Same. Comp. Stats., p. 385, sec. 469.

Nevada. — Same. Gen. Stats., sec. 3016.

Oregon. — Same, except that "three preceding sections" is omitted, and "preceding section" is substituted therefor. Hill's Laws, sec. 3076.

Utah. — Same as California. Comp. Laws, sec. 2679.

Washington. — Same as California. Gen. Stats., sec. 1466.

§ 403. [1310.] Death of Devisee. — When any estate is devised to any child, or other relation of the testator, and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will in the same manner as the devisee would have done had he survived the testator.

Arizona. — "Where a testator or testatrix shall devise or bequeath an estate or interest of any kind, by will, to a child or other descendant of such testator, should such devisee or legatee during the lifetime of the testator or testatrix die leaving a child, or children, or descendants who shall survive such testator or testatrix, such devise or legacy shall not lapse by reason of such death, but the estate so devised or bequeathed shall vest in the children or descendants of such legatee or devisee in the same manner as if he or she had survived the testator or testatrix and had died intestate." Rev. Stats., sec. 3246.

Idaho. — Same as California. Rev. Stats., sec. 5747.

Montana. — Same as California. Comp. Stats., p. 385, sec. 470.

Nevada. — Same as California. Gen. Stats., sec. 3017.

Oregon. — Same as California. Hill's Laws, sec. 3077.

Utah. — Same as California. Comp. Laws, sec. 2680.

Washington. — Same as California. Gen. Stats., sec. 1467.

The word "relation" as used in the statute, providing that a devise to a relation shall not lapse by the death of a devisee in the lifetime of the testator if the devisee leaves lineal descendants, includes only relations by blood, and not by affinity: *In re Pfuell*, 48 Cal. 643.

§ 404. [1311.] Devises of Land, how Construed. — Every devise of land in any will conveys all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.

Idaho. — Same. Rev. Stats., sec. 5748.

Montana. — Same. Comp. Stats., p. 386, sec. 471.

Nevada. — Same. Gen. Stats., sec. 3018.

Oregon. — "If any person by last will devise any real estate to any person for the term of such person's life, and after his death to his or her children or heirs, or right heirs in fee, such devise shall vest an estate for life only in such devisee, and remainder in fee-simple in such children." Hill's Laws, sec. 3093.

"A devise of real property shall be deemed and taken as a devise of all the estate or interest of the testator therein, subject to his disposal, unless it clearly appears from the will that he intended to devise a less estate or interest; and any estate or interest in real property acquired by any one after the making of his or her will shall pass thereby, unless it clearly appears therefrom that such was not the intention of the testator; nor shall any conveyance or disposition of real property by any one after the making of his or her will prevent or affect the operation of such will upon any estate or interest therein subject to the disposal of the testator at his or her death." Hill's Laws, sec. 3094.

Utah. — Same as California. Comp. Laws, sec. 2681.

Washington. — Same as California. Gen. Stats., sec. 1472.

See § 371, *ante*, § 421, *post*.

Under the common law every devise of real estate was specific, but under the statute of this state it may be general: *In re Woodworth*, 31 Cal. 595.

A devise of all the real estate of which the testator may die seised is a general and not a specific devise: *In re Woodworth*, 31 Cal. 595.

The will operates only upon so much of the land of the testator as legally and equitably belonged to him at his death: *Bruck v. Tucker*, 32 Cal. 423.

§ 405. [1312.] Will to Pass Rights Acquired after the Making thereof. — Any estate, right, or interest in lands acquired by the testator after the making of his will passes thereby and in like manner as if title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator. Every will made in express terms devising, or in any other terms denoting the intent of the testator to devise, all the real estate of such testator passes all the real estate which such testator was entitled to devise at the time of his decease.

Idaho. — Same. Rev. Stats., sec. 5749.

Montana. — Same. Comp. Laws, p. 386, sec. 472.

Nevada. — "Any estate, right, or interest in lands acquired by the testator after the making of his or her will shall pass thereby in like manner as if it passed at the time of making the will, if such should manifestly appear by the will to have been the intention of the testator." Gen. Stats., sec. 3019.

Utah. — Same as California. Comp. Laws, sec. 2682.

Washington. — Same as Nevada. Gen. Stats., sec. 1474.

What Realty Passes by Will. — Charles Hopper made a will containing a devise to his son of certain real estate. By other provisions of the will an intention was manifested to dispose by the will of all the property

the testator possessed. After making said will, he sold a portion of the land devised to his son, and afterwards repurchased it. In such case, held, that the portion so sold and bought back passed to the son under said devise: *In re Hopper*, 66 Cal. 80; *Wheeler v. Bolton*, 66 Cal. 83.

Where testator devises prop-

erty, and afterwards makes a contract of sale of a portion thereof, delivering a deed therefor in escrow to be delivered to the purchaser upon the payment of the purchase price, and dies before the purchase price is paid, such property passes by the will subject to a specific performance against the devisees: *Chadwick v. Tatem*, 9 Mont. 345.

§ 406. [1313.] **Charitable Bequests.** — No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society, or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made, at least thirty days prior to such death, such devise or legacy, and each of them, shall be valid; *provided*, that no such devises or bequests shall collectively exceed one third of the estate of the testator, leaving legal heirs; and in such case a *pro rata* deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law.

Idaho. — Same. Rev. Stats., sec. 5750.

Montana. — Same. Comp. Stats., p. 386, sec. 473.

See § 371, *ante*.

Boys' Roman Catholic Asylum is a charitable and benevolent society, and is entitled to take a legacy or devise: *In re Tobin*, Myr. Prob. 134.

The "one third" mentioned in the above section is of the gross value of the estate, not net value: *In re Hinckley*, Myr. Prob. 189.

A devise to trustees for a charity is sufficiently definite as a subject of a trust: *In re Hinckley*, Myr. Prob. 189.

Devise in trust for a church,

which does not exist at time of testator's death, is a charitable trust, and is valid against the heirs of testator: *Pennoyer v. Wadhams*, 20 Or. 274.

A grant of land "upon which shall be erected a college free from all sectarian or political influence" is in its nature a charitable trust, and, as such, it is no objection that the beneficiaries are uncertain or unknown: *Raley v. County of Umatilla*, 15 Or. 172.

CHAPTER XV.

INTERPRETATION OF WILLS, AND EFFECT OF VARIOUS PROVISIONS.

- § 407. Testator's intention to be carried out.
- § 408. Intention to be ascertained from the will.
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§ 407. [1317.] Testator's Intention to be Carried out. — A will is to be construed according to the intention of

the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.

Montana. — Same. Comp. Stats., p. 387, sec. 474.

Oregon. — "All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator in all matters brought before them." Hill's Laws, sec. 3097.

Utah. — Same as California. Comp. Laws, sec. 2683.

Washington. — Same as Oregon. Gen. Stats., sec. 1478.

Wills are to be liberally construed, so as to effectuate the intention of the testator: *Welch v. Huse*, 49 Cal. 506; *Kidwell v. Brummagin*, 32 Cal. 436; *In re Woods*, 36 Cal. 75; *Williams v. McDougall*, 39 Cal. 80; *In re Miller*, 48 Cal. 165; *In re Radovich*, 54 Cal. 540; *Morrison v. Bowman*, 29 Cal. 337; *In re Stewart*, 74 Cal. 98. See also *Siddall v. Harrison*, 73 Cal. 560.

Pro rata in olographic will: *Rosenberg v. Frank*, 58 Cal. 387.

Will, construction of — Contingent remainder: See *Jasper v. Jasper*, 17 Or. 590.

Testator became a member of a mutual insurance association whose constitution provided that the association would pay a stated sum, upon the death of the member, to the person designated in writing as beneficiary, allowing a change of beneficiary on application in writing to the secretary, and his deceased wife, without his designation, was made beneficiary. Subsequently he remarried, and by his will bequeathed the insurance to his surviving wife, directing the officers of the order to substitute her name in the certificate, and pay her the money. It was held that a judgment awarding the fund to the executor of testator's estate to be distributed as the probate court might direct was proper, as against the heirs of the first wife, she never having been designated as beneficiary: *Order of Mutual Companions v. Griest*, 76 Cal. 494. Such surviving wife is entitled to the fund as against testator's children: *In re Griest*, 76 Cal. 497.

A trust is created, if the testatrix, by her will, devised certain real estate in trust, with directions to the trustee to apply the rents, issues, and profits thereof, — 1. To the payment of

a certain mortgage; 2. To the payment of certain legacies to her daughters; 3. To the payment of a legacy for a charitable purpose; that after such payments have been made, the whole of the income of the property shall be given to her son, James, during the term of his natural life, and after his death, the same to vest in another person in fee; and it was held that, under sections 857 and 863 of California Civil Code, a valid express trust was created for the purposes specified therein; that the entire estate was vested in the trustee, subject to the execution of the trust; and that the son, James, did not acquire any life estate in the property or right to its possession: *In re Dolan*, 79 Cal. 65.

Constructive Trust. — Where a testator, by his will, bequeathed property in trust to a legatee, without specifying in the will the purposes of the trust, and at the time of the execution of the will, or subsequently, verbally communicates to the legatee the purposes of the trust, and the legatee, either expressly or impliedly, promises to perform the trust, or silently acquiesces therein, equity will raise a constructive trust in favor of the beneficiaries intended by the testator, and will charge the legatee as a constructive trustee for them: *Curdy v. Berton*, 79 Cal. 420.

Where will devises testator's estate in trust to be invested, and to pay the income to certain persons named in certain proportions during their lives, and to their surviving husbands or widows until remarriage, and after that event, the same proportions in trust in equal shares for their children by the first marriage who shall attain the age of twenty-one years or marry, and during the minority of any legatee, to apply the income

of their respective shares toward his or her support or advancement in the world, the life devisees take only the income and no part of the *corpus* of the residuary estate, but the *corpus* of the trust property will pass to the children, to be paid over to them in the proportions specified when they arrive at majority or marry, there being no provision for a continuance of the trust thereafter: *Goldtree v. Thompson*, 79 Cal. 613.

Such will does not create a perpetuity, or unlawfully suspend the power of alienation, since all the persons beneficially interested in the will were living at the death of the testator, save one child, who died a minor and unmarried, and the accumulations were lawful, being only for the benefit of minors, to end with their minority or marriage. Accumulations of income on an invested fund are not forbidden because they tend to a perpetuity. A child born after the death of the testator, who is specified as one of the legatees, having come into existence during the life of its father, one of the lives in being at the creation of the interest, would take an interest under the will, vested in right when born, and in possession contingent on attaining majority or marriage within twenty-one years after its father's death, which event would not render the interest devised void: *Goldtree v. Thompson*, 79 Cal. 613.

Trust. — A devise of the residue of the personal estate of a testator to certain trustees in trust to be invested, and to divide the accumulations of income thereof in certain proportions to certain persons named during life, and to the surviving husband or widow of each until remarriage, and to their children during minority or until marriage, and to pay to such children the residuum of the estate in certain proportions, when attaining age or marrying, creates a valid trust if accepted by the trustees, under the provisions of sections 2221 and 2222 of the California Civil Code: *Goldtree v. Thompson*, 79 Cal. 613.

In the exposition of a will, the intention of the testator, expressed in his will, must prevail, provided it be consistent with the rules of law. A will devising real property, and recommending the devisee to leave his

portion thereof, after his death, and that of his wife, in trust for his son, and the children or descendants of such son, if any be alive at his death, and if there be none so alive, to Harvard College, does not make such recommendation obligatory, or limit the estate, or create a trust in favor of Harvard College, it appearing that the testator was a lawyer who understood fully what was necessary in order to vest a trust estate, and what he desired done with his property, and it further appearing from the whole of the will, taken together, that when he intended trusts to exist, he said so in plain language, and when he gave persons property and made recommendations concerning it, he meant to leave them free to act upon his advice or not, as they saw fit, but did not intend in any way to limit the estates he had bequeathed to them: *In re Whitcomb*, 86 Cal. 265.

A will which declares the testator's lands to be the property of the testator's daughter and the sons of a deceased son, and further states that the widow of a deceased son has a house on a portion of the land called "Chino"; that it is the will of the testator that she be permitted to remain in permanency in her house, with liberty to raise her cattle and cultivate it, — it was held that under such will the fee passed to the daughter and grandsons, subject to an estate for life in the widow to the part called "Chino": *Bernal v. Wade*, 46 Cal. 663.

Where a testator made certain specific bequests in coin to sisters of the full-blood, of the half-blood, and children of a deceased sister of the full-blood, and then bequeaths the residue of his estate to be divided among said legatees *pro rata*, it was held that the distribution was to be made in accordance with the rate previously indicated by the testator: *Rosenburg v. Frank*, 58 Cal. 387.

Where a widow with knowledge of her rights makes an unequivocal assumption of ownership of one of two properties between which she has a right to choose, it is an election: *Burroughs v. De Couts*, 70 Cal. 361.

Testatrix bequeathed to her husband the use and income of all her property as long as he remained a

widower, without power to dispose of or encumber the same, and with a proviso that, should he marry again, her share in the common property should go to her children. The husband was entitled, under this devise, to the use and income of the property as long as he remained a widower, and as to the fee, decedent died intestate: *In re Reinhardt*, 74 Cal. 365.

Word "children" construed to be "grandchildren" when: *In re Schedel*, 73 Cal. 594.

A codicil ratifying former will and making other bequests to same legatees was held to bequeath cumulative legacies: *In re Zeile*, 74 Cal. 125.

A devise in trust is not a perpetuity when coupled with a power of alienation: *In re Hinckley*, Myr. Prob. 189.

If the superior court has jurisdiction of an action for the construction of a will, it may refuse to exercise it in an action brought to have plaintiff's heirship determined and to declare certain legacies void, where plaintiffs are not mentioned in the will, and no special reason is shown for the intervention of equity or for the adjudication asked prior to final distribution: *Siddall v. Harrison*, 73 Cal. 560.

Construction of wills cannot be made by probate courts; suits for that purpose must be brought in the district court or the supreme court: *Chadwick v. Chadwick*, 6 Mont. 566.

The devisee in a will takes the property devised as absolute owner, and not upon trust, when the devise is as follows: "Having the fullest confidence in the capacity, judgment, discretion, and affection of

my wife to properly bring up, educate, and provide for our children, and to manage and dispose of my said property in the best manner for her interest and their own, I give to her," etc.: *Hunt v. Hunt*, 11 Nev. 442.

Construction of will as to estates granted therein to legatees: *Buchanan v. Schulderman*, 11 Or. 150.

A bequest for and during her natural life to a testator's wife, so long as she remains single, subject to all lawful debts, etc., of the absolute use and control of all the rest and residue of testator's property, for her comfort and support, and the support and education of their children, to be equally divided among the latter at the decease of the wife, gives her the use, but not the consumption, of the money, or principal of notes, part of testator's estate, and allows her to use only the interest arising from such notes or other investments: *Leahy v. Cardwell*, 14 Or. 171.

A power in a will as follows: "It is my further desire that out of the proceeds of my estate, leaving the same to the best judgment and discretion of said executor hereinafter mentioned, to pay" certain sums per month to testator's mother and aunt, — gives to the executors, or an administrator with the will annexed, authority to determine how much shall be paid such beneficiaries; but the word "proceeds," in said clause, does not mean income, and the executor or administrator is not confined to the income of the estate in making such payments, but he has no power to sell property for that purpose without an order of court: *Allen v. Barnes*, Sup. Ct. Utah, Feb. 2, 1887.

§ 408. [1318.] **Intention to be Ascertained from the Will.**—In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.

Montana. — Same. Comp. Stats., p. 388, sec. 475.

Utah. — Same. Comp. Laws, sec. 2684.

A provision in a will requiring the executor to purchase, "at a price not exceeding \$—, a tract of land at or near the residence of said Wil-

sons at Santo Barbara, for a cattle pasture, the free and exclusive use of which the said Wilsons shall have during their lifetime and the survivor of them, but which tract of land shall at the death of both of them vest in fee in their daughter," is void for uncertainty: *In re Traylor*, 81 Cal. 9.

§ 409. [1319.] Rules of Interpretation.—In interpreting a will, subject to the law of this state, the rules prescribed by the following sections of this chapter are to be observed, unless an intention to the contrary clearly appears.

Montaná. — Same. Comp. Stats., p. 388, sec. 476.

Utah. — Same. Comp. Laws, sec. 2685.

In the absence of a proof of the laws of another state, the courts of this state, in interpreting a will made in that state, will presume its laws to be the same as our laws: *Norris v. Harris*, 15 Cal. 226.

R. died leaving property, principally cash, in this state, and also real property in Nevada. In his will he made certain money legacies; he also directed his executors to deposit in some secure place all rents from the property in Nevada, and all the rents and profits derived from his

estate; that the same should be applied to the payment of an annuity to his mother and to the education of certain nephews and nieces, and bequeathed the residue of his estate to his nephews and nieces generally.¹ It was held that the money legacies should look first to the California assets for payment, and that the proceeds of the Nevada property should, at least for the present, be reserved for the annuity and the education of the nephews and nieces: *In re Radovich*, 54 Cal. 540.

§ 410. [1320.] Several Instruments are to be Taken Together.—Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument.

Montana. — Same. Comp. Stats., p. 388, sec. 477.

Utah. — Same. Comp. Laws, sec. 2686.

Any paper in existence at the time may be referred to in a will, and if sufficiently identified, it may be made a part of the will by such reference:

In re Shillaber, 74 Cal. 144. But documents merely referred to do not necessarily become a part of the will: *In re Myers*, Myr. Prob. 205.

§ 411. [1321.] Harmonizing Various Parts.—All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.

Montana. — Same. Comp. Stats., p. 388, sec. 478.

Utah. — Same. Comp. Laws, sec. 2687.

If a word in a will is repugnant to the intention clearly manifested in other parts of the instrument, it may be regarded as surplusage or be restricted in its application: *In re Wood*, 36 Cal. 75.

§ 412. [1322.] In What Case Devise not Affected.

— A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.

Montana. — Same. Comp. Stats., p. 388, sec. 479.

Utah. — Same. Comp. Laws, sec. 2688.

The following are precatory words, and do not create a trust: "To my beloved wife, Emelie Glass, to have and to hold the same, or any parcel thereof, with privilege to dispose of the same, or any portion thereof, for her use and interest, or those of our beloved children": *In re Glass*, Myr. Prob. 213. So, also, the following: "To my beloved wife, the whole of my property, for her own use and benefit, and to maintain and support my said children with the same, to be hers absolutely": *In re Molk*, Myr. Prob. 212.

The will of testator contains this provision: "I give and bequeath to my wife all of the estate, real and personal, of which I shall die seised or possessed, or entitled to. I recommend to her the care and pro-

tection of my mother and sister, and request her to make such gift and provision for them as, in her judgment, will be best." Upon a consideration of the effect of the above provision, it was held not to be an absolute gift or bequest in trust for the mother and sister of the testator; that there was no imperative command to make a provision for their support, but only a recommendation and request, leaving the matter to the judgment and discretion of the widow. Words of recommendation are never construed as trusts, unless the subject be certain. The will in question fails in this condition of certainty as to the subject, even under the English rule most favorable to such trusts: *Colton v. Colton*, 127 U. S. 300.

§ 413. [1323.] When Ambiguous or Doubtful. —

Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will.

Montana. — Same. Comp. Stats., p. 388, sec. 480.

Utah. — Same. Comp. Laws, sec. 2689.

§ 414. [1324.] Words Taken in Ordinary Sense. —

The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained.

Montana. — Same. Comp. Stats., p. 388, sec. 481.

Utah. — Same. Comp. Laws, sec. 2690.

See *Colton v. Colton*, 127 U. S. 300. See § 430, *post*.

Where a testator had but one flour-mill, and made a devise in these words: "To my daughter, Lolita, the flour-mill, with the land appertaining thereto, — a half-league more or less,

— it was held that the language was sufficiently accurate in expression and certain in its application to the subject of devise: *Bruck v. Tucker*, 42 Cal. 346.

§ 415. [1325.] Words to Receive an Operative Construction.—The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.

Montana.—Same. Comp. Stats., p. 388, sec. 482.

Utah.—Same. Comp. Laws, sec. 2691.

§ 416. [1326.] Intestacy to be Avoided.—Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.

Montana.—Same. Comp. Stats., p. 388, sec. 483.

Utah.—Same. Comp. Laws, sec. 2692.

An olographic will should be admitted to probate, where it is incomplete in a slight degree concerning the disposition to be made of certain personal property, which forms a small part of the estate, as intestacy is to be avoided, if possible, under the above section: *In re Shillaber*, 74 Cal. 144.

Decedent bequeathed to her niece finger-rings, "and so many of my books, pictures, and ornaments (not otherwise bequeathed specifically)

as she shall choose to take"; the word "ornaments" includes articles of jewelry, although, as following the words "books" and "pictures," it might be construed as intending articles *ejusdem generis*; yet this presumption is overcome by the fact that nearly all the articles specifically bequeathed which could be included as ornaments are in fact jewelry: *In re Traylor*, 75 Cal. 189.

§ 417. [1327.] Effect of Technical Words.—Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention.

Montana.—Same. Comp. Stats., p. 388, sec. 484.

Utah.—Same. Comp. Laws, sec. 2693.

A general guardian must be appointed to contest a will for a minor: *In re Cameto*, Myr. Prob. 75.

§ 418. [1328.] Technical Words not Necessary.—Technical words are not necessary to give effect to any species of disposition by a will.

Montana.—Same. Comp. Stats., p. 388, sec. 485.

Utah.—Same. Comp. Laws, sec. 2694.

§ 419. [1329.] Certain Words not Necessary to Pass a Fee.—The term "heirs" or other words of inheritance are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited.

Montana. — Same. Comp. Stats., p. 388, sec. 486.

Oregon. — See Hill's Laws, sec. 3094, under § 52, *ante*.

Utah. — Same. Comp. Laws, sec. 2695.

See §§ 370, 396, 404, *ante*.

If, by the terms of a will, the estate is devised to A, to have and to hold during his lifetime, and then go to his heirs, the whole fee-simple estate will vest in A, if the word "heirs" is used in a general sense, indicating those to whom by law the property would pass by descent, but this result will not

follow, if the word is used in a special or restrictive sense to designate certain particular persons: *Norris v. Hensley*, 27 Cal. 439.

"Issue of her body" is not synonymous with "heirs": *In re McDonnell*, Myr. Prob. 94; *Norris v. Hensley*, 27 Cal. 439.

§ 420. [1330.] Power to Devise — How Executed by Terms of Will. — Real or personal property embraced in a power to devise passes by a will purporting to devise all the real or personal property of the testator.

Montana. — Same. Comp. Stats., p. 389, sec. 487.

Utah. — Same. Comp. Laws, sec. 2696.

§ 421. [1331.] Devise or Bequest of All Real or All Personal Property, or Both. — A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death.

Montana. — Same. Comp. Stats., p. 389, sec. 488.

Utah. — Same, except that "and" is substituted for "or," after the words "all his real." Comp. Laws, sec. 2697.

"Devise" includes personalty, signification: *In re Pfuellb*, Myr. Prob. notwithstanding its original original 38; affirmed 48 Cal. 643.

§ 422. [1332.] Residuary Clause. — A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will.

Montana. — Same. Comp. Stats., p. 389, sec. 489.

Utah. — Same. Comp. Laws, sec. 2698.

§ 423. [1333.] Same. — A bequest of the residue of the testator's personal property passes all the personal property which he was entitled to bequeath at the time of his death, not otherwise effectually bequeathed by his will.

Montana. — Same. Comp. Stats., p. 389, sec. 490.

Utah. — Same. Comp. Laws, sec. 2699.

§ 424. [1334.] "Heirs," "Relatives," "Issue," "Descendants," Etc. — A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives," or "personal representatives," or "family," "issue," "descendants," "nearest," or "next of kin" of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession, in this code.

Montana. — Same. Comp. Stats., p. 339, sec. 491.

Utah. — Same. Comp. Laws, sec. 2700.

"Issue of her body" is not synonymous with "heirs": *In re McDonnell*, Myr. Prob. 94; *Norris v. Hensley*, 27 Cal. 439.

§ 425. [1335.] Words of Donation and of Limitation. — The terms mentioned in the last section are used as words of donation, and not of limitation, when the property is given to the person so designated directly, and not as a qualification of an estate given to the ancestor of such person.

Montana. — Same. Comp. Stats., p. 339, sec. 492.

Utah. — Same. Comp. Laws, sec. 2701.

§ 426. [1336.] To What Time Words Refer. — Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.

Montana. — Same. Comp. Stats. p. 339, sec. 493.

Utah. — Same. Comp. Laws, sec. 2702.

§ 427. [1337.] Devise or Bequest to a Class. — A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed.

Montana. — Same. Comp. Stats., p. 339, sec. 494.

Utah. — Same. Comp. Laws, sec. 2703.

In will "to those of the above-mentioned children who have attained the age of twenty-one years," held to apply only to those who were of that age at death of testator: *In re Crooke*, Myr. Prob. 247.

§ 428. [1338.] When Conversion Takes Effect. — When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death.

Montana. — Same. Comp. Stats., p. 389, sec. 495.

Utah. — Same. Comp. Laws, sec. 2704.

§ 429. [1339.] When Child Born after Testator's Death Takes under Will. — A child conceived before, but not born until after, a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.

Montana. — Same. Comp. Stats., p. 389, sec. 496.

Utah. — Same. Comp. Laws, sec. 2705.

§ 430. [1340.] Mistakes and Omissions. — When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received.

Montana. — Same. Comp. Stats., p. 390, sec. 497.

Utah. — Same. Comp. Laws, sec. 2706.

See § 414, *ante*.

Proof extrinsic to a will may be made to show who testator intended to nominate as executor: *In re Colette*, Myr. Prob. 116.

§ 431. [1341.] When Devises and Bequests Vest. — Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death.

Montana. — Same. Comp. Stats., p. 390, sec. 498.

Utah. — Same. Comp. Laws, sec. 2707.

A will only becomes executed upon the death of a testator: *Grime's Estate v. Norris*, 6 Cal. 625.

A will by which real estate was devised to certain infants provided that they each might "take out" one half of his share when he should come of age, and the other half not until all the other children should come of age; it was held that the title to the property vested in the infants upon the testator's death, and this estate was

the subject of sale under the provision of the statute. Such sale would transfer to the purchaser whatever rights the infants would have in such property: *Fitch v. Miller*, 20 Cal. 352.

A devise to a person "absolutely," to be "distributed" to him at the expiration of three years, is a vested interest in fee, postponed merely in enjoyment: *Williams v. Williams*, 73 Cal. 99.

§ 432. [1342.] When cannot be Divested.—A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.

Montana. — Same. Comp. Stats., p. 390, sec. 499.

Utah. — Same. Comp. Laws, sec. 2708.

§ 433. [1343.] Death of Devisee or Legatee.—If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, except as provided in section thirteen hundred and ten.

Arizona. — See Rev. Stats., sec. 3246, under § 403, *ante*.

Montana. — Same. Comp. Stats., p. 390, sec. 500.

Utah. — Same, except that "section 37, chapter 1, of this act" (Comp. Laws, sec. 2682), is substituted for "section 1310." Comp. Laws, sec. 2709. For Comp. Laws, sec. 2682, see § 405, *ante*.

§ 434. [1344.] Interests in Remainder are not Affected.—The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interests of persons in remainder who survive the testator.

Montana. — Same. Comp. Stats., p. 390, sec. 501.

Utah. — Same. Comp. Laws, sec. 2710.

§ 435. [1345.] Conditional Devises and Bequests.—A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.

Montana. — Same. Comp. Stats., p. 390, sec. 502.

Utah. — Same. Comp. Laws, sec. 2711.

A bequest to an association on condition that it is in existence at testator's death lapses if said association ceases to exist prior to such death, and a new association, organized for the same purposes as the old, and composed of the same persons, cannot take the bequest: *In re Neil*, Myr. Prob. 79.

Assignee takes nothing, if his assignor is one of two devisees, where the will provides that the whole estate shall go to them and to the survivor of them if his assignor dies prior to

distribution: *In re Cronin*, Myr. Prob. 252.

In the construction of a will, due regard must be had to the directions contained therein, and to the true interests and meaning of the testator in all matters relating thereto; and when a clause in the will provides, in general terms, for the limitation over of the devise to a second taker upon a contingent event, the intention of the testator, as indicated by all the parts of the will, must determine when and under what particular circum-

stances the contingency arises: *Shaden v. Hembree*, 17 Or. 14.

When a will provides that the income of the estate is to be paid to the children of the testator during their natural lives, and in the event of the death of any of them, one fifth part of the residue of the estate shall go to the lawful issue of such child, and in the event of a daughter becoming a widow, or otherwise lawfully

separated from her husband, one fifth part shall go to such daughter, the children of a married daughter have an interest in the property, and are entitled to have it remain undisposed of by their mother until the conditions of the will are complied with, and to inherit the same upon the death of the mother before such condition shall happen: *Born v. Horstmann*, 80 Cal. 452.

§ 436. [1346.] Condition Precedent, What.—A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.

Montana.—Same. Comp. Stats., p. 390, sec. 503.

Utah.—Same. Comp. Laws, sec. 2712.

Wife of a felon under sentence of imprisonment for life is a widow so as to take property under the will of another, which is to vest upon her becoming a widow: *In re Stott*, Myr. Prob. 168.

A condition in a will that each of the daughters of the testator shall receive a certain portion of the estate

in the event of becoming a widow or otherwise becoming lawfully separated from her husband, is not void as against public policy, or as holding out an inducement for an unlawful separation of the daughter from her husband, but will be enforced as lawful and valid: *Born v. Horstmann*, 80 Cal. 452.

§ 437. [1347.] Effect of Condition Precedent.—Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled, except where such fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will.

Montana.—Same. Comp. Stats., p. 390, sec. 504.

Utah.—Same. Comp. Laws, sec. 2713.

§ 438. [1348.] Conditions Precedent, when Deemed Performed.—A condition precedent in a will is to be deemed performed when the testator's intention has been substantially, though not literally, complied with.

Montana.—Same. Comp. Stats., p. 390, sec. 505.

Utah.—Same. Comp. Laws, sec. 2714.

§ 439. [1349.] Conditions Subsequent, What.—A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event.

Montana. — Same. Comp. Stats., p. 390, sec. 506.

Utah. — Same. Comp. Laws, sec. 2715.

Where H. made his will, in which he devised his farm to his son, and certain town property to his wife, and directed that the wife should have the use, control, and management of all his property, both real and personal, during her natural life, or so long as she remained his widow, and then it should go to his son, except as therein provided; and by a subsequent clause in the will it was directed that in event his wife and son should die before the son became twenty-one years of age, then that his real estate should descend to his nephew, to whom he devised it in the event mentioned, and that his personal property should be divided among the brothers and sisters of himself and wife, — it was held that the will created a life estate in the wife, remainder in the son, and a limitation in the nature of an executory devise in the nephew; and that upon the happening of the contingency upon which the limitation over to the nephew was made to depend, the title to the real property vested in him, or in his heirs in case of his death. Held further, however, that the clause in the will creating the contingency must be construed with reference to other parts of the will, and if it appeared therefrom that it was the intention of the testator that the limitation over was only to take effect in the event of the wife and son dying within the time referred to, and of the nephew, being alive, to take the property at the

time of the death of the wife, the will should be construed in accordance with such intention: *Shadden v. Hambree*, 17 Or. 14.

And where it appeared that the nephew died first, the wife subsequently, and that the son survived the latter, — held, that the contingency upon which the limitation depended did not happen; that the son took the real property in fee, and upon his death it descended to his heirs, under the laws of the state governing descents, and that the heirs of the nephew had no claim upon it: *Shadden v. Hambree*, 17 Or. 14.

Held also, that if the limitation over had been by way of contingent remainder, instead of executory devise, the result would have been the same; that they both depend upon a contingency which must occur before they can take effect; and that when the happening of the contingency becomes impossible, the estate in the first taker, under the will, becomes absolute: *Shadden v. Hambree*, 17 Or. 14.

Held also, under the particular circumstances of this case, that the son having died leaving no child, wife, father, mother, sister, or brother, or issue of any brother or sister, the estate descended to his grandmother on his father's side, and his grandfather and grandmother on his mother's side, in equal shares to each: *Shadden v. Hambree*, 17 Or. 14.

§ 440. [1350.] **Devisees, etc., Take as Tenants in Common.** — A devise or legacy given to more than one person vests in them as owners in common.

Idaho. — Same. Rev. Stats., sec. 2907.

Montana. — Same. Comp. Stats., p. 390, sec. 507.

Utah. — Same. Comp. Laws, sec. 2716.

Devise to decedent's next of kin surviving, viz.: the three De Laurencels, children of a deceased sister, and five De Booms, children of a deceased brother, under a direction that all the property was devised in trust for a certain time, and then to go to the De Booms and De Laurencels, — is a devise

to them as a class, and, as such, they are entitled to share equally: *De Laurencel v. De Boom*, 67 Cal. 362.

A devise to a woman and her children passes an estate in common to all. The rule in Shelley's case is confined to cases in which a freehold is devised to one, the remainder in

terms is to go to the heirs of the first taker, and does not apply to a devise to a mother and her children. It was further held that where a condition was attached to such devise that Margaret would take care of the testator during his lifetime, which she did, that there was nothing in this condition to show the intention of the testator that she alone should have the benefit of the devise: *In re Utz*, 43 Cal. 201.

§ 441. [1351.] Advancements, when Ademptions.

— Advancements or gifts are not to be taken as ademptions of general legacies, unless such intention is expressed by the testator in writing.

Montana. — Same. Comp. Stats., p. 390, sec. 508.

Utah. — Same. Comp. Laws, sec. 2717.

CHAPTER XVI.

GENERAL PROVISIONS.

- § 442. Nature and designations of legacies.
- § 443. Order of sale in case of an intestate.
- § 444. Order of resort to estate for debts.
- § 445. Legacies, how charged with debts.
- § 446. Same.
- § 447. Abatement.
- § 448. Specific devises and legacies.
- § 449. Heir's conveyance good, unless will is proved within four years.
- § 450. Possession of legatees.
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- § 452. Satisfaction.
- § 453. Legacies, when due.
- § 454. Interest.
- § 455. Construction of these rules.
- § 456. Executor according to the tenor.
- § 457. Power to appoint is invalid.
- § 458. Executor not to act till qualified.
- § 459. Provisions as to revocations.
- § 460. Execution and construction of prior wills not affected.
- § 461. The law of what place applies.
- § 462. Liability of beneficiaries for testator's obligations.

§ 442. [1357.] Nature and Designation of Legacies.—Legacies are distinguished and designated, according to their nature, as follows:—

1. A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator.

2. A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid; if such fund or property fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy.

3. An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable

fails, resort may be had to the general assets, as in case of a general legacy.

4. A residuary legacy embraces only that which remains after all the bequests of the will are discharged.

5. All other legacies are general legacies.

Montana. — Same. Comp. Stats., p. 391, sec. 509.

Utah. — Same. Comp. Laws, sec. 2718.

See *In re Neistrath*, 66 Cal. 330.

A specific bequest of personal property is the bequest of a particular thing or money specified and distinguished from all other things of the same kind: *In re Woodworth*, 31 Cal. 595.

At common law, a devise of realty was considered a specific devise, but it may be general under the California code: *In re Woodworth*, 31 Cal. 595.

A bequest of "all my personal estate," etc., is not a specific bequest, and under the common law would not discharge the personalty from being applied to the payment of debts: *In re Woodworth*, 31 Cal. 595.

Specific Legacy. — Where all

demonstrative legacies cannot be paid from a fund provided therefor, such legacies will abate proportionately, whether the legacies be to kindred or to strangers, except that in the matter of payment of debts the legacies to kindred are not to be resorted to until those to strangers have been exhausted for that purpose: *In re Apple*, 66 Cal. 432.

Where demonstrative legacies are directed to be paid from a special fund named in the will, the court will not direct the payment out of such fund of a legacy that may ultimately be satisfied from another source: *In re Radovich*, Myr. Prob. 118; affirmed 54 Cal. 540.

§ 443. [1358.] Order of Sale in Case of an Intestate. — When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in this code and the Code of Civil Procedure.

Idaho. — Same. Rev. Stats., sec. 5751.

Montana. — Same. Comp. Stats., p. 392, sec. 510.

Utah. — Same. Comp. Laws, sec. 2719.

§ 444. [1359.] Order of Resort to Estate for Debts. — The property of a testator, except as otherwise specially provided in this code and the Code of Civil Procedure, must be resorted to for the payment of debts, in the following order: —

1. The property which is expressly appropriated by the will for the payment of the debts;
2. Property not disposed of by the will;
3. Property which is devised or bequeathed to a residuary legatee;

4. Property which is not specifically devised or bequeathed; and

5. All other property ratably. Before any debts are paid, the expenses of the administration and the allowance to the family must be paid or provided for.

Idaho. — Same. Rev. Stats., sec. 5752.

Montana. — Same. Comp. Stats., p. 372, sec. 511.

Oregon. — "When a testator shall have specially bequeathed any specific article of personal property, or given any legacy by will, and there shall not be sufficient personal property, besides such specific article or the value of such legacy, to pay the funeral charges, expenses of administration, and claims against the estate, the executor or administrator shall obtain an order to sell the real property sufficient to make up the deficiency, in the manner hereinbefore provided." Hill's Laws, sec. 1154.

"If the provision made by the will, or the property thereby appropriated, be insufficient for the purpose intended, the remaining portion of the estate may be sold for that purpose, according to the provisions of this title." Hill's Laws, sec. 1156.

Utah. — Same as California. Comp. Laws, sec. 2720.

If the court makes an order applying the proceeds of the sale of a special bequest, made by the testator, to the payment of a debt, the executors cannot object that there are other special bequests besides that thus applied: *In re Moulton*, 48 Cal. 191.

If a special bequest is applied to the payment of a debt, and there are other special bequests, the remedy of the one whose special bequest is thus applied is to seek contribution from the others: *In re Moulton*, 48 Cal. 191.

If the real estate has been sold, and an order is made by the court applying the proceeds of a special bequest

of personal property to the payment of a debt, it will be presumed that the personal estate not specially bequeathed has been thus applied, and that it was necessary thus to apply the proceeds of the special bequest, unless the contrary appears by the record: *In re Moulton*, 48 Cal. 191.

Where the court makes an order applying the proceeds of a special bequest to the payment of a debt, and the will is not in the record, it will not be presumed that the court erred in adjudging that the intention of the testator could be carried into effect, and yet sell the special bequest: *In re Moulton*, 48 Cal. 191.

§ 445. [1360.] Same—For Legacies.—The property of a testator, except as otherwise specially provided in this code and the Code of Civil Procedure, must be resorted to for the payment of legacies, in the following order:—

1. The property which is expressly appropriated by the will for the payment of the legacies;

2. Property not disposed of by the will;

3. Property which is devised or bequeathed to a residuary legatee;

4. Property which is [not] specifically devised or bequeathed.

Idaho. — Same. Rev. Stats., sec. 5753.

Montana. — Same. Comp. Stats., p. 392, sec. 512.

Utah. — Same. Comp. Laws, sec. 2721.

Legacies, when Due: See § 453, *post*.

When may be Paid: See § 283, *ante*.

Legacies Liable for Debts: See § 207, *ante*.

A devisee, by accepting a devise charged with the payment of a legacy, becomes personally liable therefor; and although the will gives the devisee the option of discharging the legacy by conveying to the legatee land equal in value to the amount of the legacy, he will be presumed to have elected to pay the same in money, notwithstanding the estate has not been fully distributed, if for a long number of years he receives the rents and profits of the devise, without directly manifesting his election, and it appears that such devise is amply sufficient to

discharge the legacy: *Dunne v. Dunne*, 66 Cal. 157.

Specific legacies or specific devises are not chargeable with the payment of general pecuniary legacies. Property specifically devised or bequeathed may be resorted to for the payment of legacies, but it can never be resorted to except when abatement takes place: *In re Neistrath*, 66 Cal. 330.

A bequest of interest on four thousand dollars to wife until she remarries is a claim upon decedent's separate estate: *In re Staus*, Myr. Prob. 5.

§ 446. [1361.] **Same.** — Legacies to husband, widow, or kindred of any class are chargeable only after legacies to persons not related to the testator.

Idaho. — Same. Rev. Stats., sec. 5754.

Montana. — Same. Comp. Stats., p. 392, sec. 513.

Utah. — Same. Comp. Laws, sec. 2722.

§ 447. [1362.] **Abatement.** — Abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will.

Montana. — Same. Comp. Stats., p. 393, sec. 514.

Utah. — Same. Comp. Laws, sec. 2723.

Abatement takes place only for equalizing legacies of every kind: *In re Neistrath*, 66 Cal. 330.
the purpose of equalizing legacies of a class, and not for the purpose of equal-

§ 448. [1363.] **Specific Devises and Legacies.** — In a specific devise or legacy, the title passes by the will, but possession can only be obtained from the personal representative; and he may be authorized by the superior court to sell the property devised and bequeathed in the cases herein provided.

Idaho. — Same. Rev. Stats., sec. 5755.

Montana. — Same, except that the words "superior court" are omitted, and the words "judge of the probate court" inserted in lieu thereof. Comp. Stats., p. 393, sec. 515.

Utah. — Same as California. Comp. Laws, sec. 2724.

§ 449. [1364.] Heir's Conveyance Good, unless Will is Proved within Four Years.—The rights of a purchaser or encumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless the instrument containing such devise is duly proved as a will, and recorded in the office of the clerk of the superior court having jurisdiction thereof, or unless written notice of such devise is filed with the clerk of the county where the real property is situated, within four years after the deviser's death.

Montana.—Same. Comp. Stats., p. 393, sec. 516.

Utah.—Same, except that "recorder of the county" is substituted for "clerk of the county," and "probate" for "superior." Comp. Laws, sec. 2725.

§ 450. [1365.] Possession of Legatees.—Where specific legacies are for life only, the first legatee must sign and deliver to the second legatee, or, if there is none, to the personal representative, an inventory of the property, expressing that the same is in his custody for life only, and that, on his decease, it is to be delivered and to remain to the use and for the benefit of the second legatee, or to the personal representative, as the case may be.

Montana.—Same. Comp. Stats., p. 393, sec. 517.

Utah.—Same. Comp. Laws, sec. 2726.

§ 451. [1366.] Bequest of Interest.—In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death.

Montana.—Same. Comp. Stats., p. 393, sec. 518.

Utah.—Same. Comp. Laws, sec. 2727.

§ 452. [1367.] Satisfaction.—A legacy, or a gift in contemplation, fear, or peril of death, may be satisfied before death.

Montana.—Same. Comp. Stats., p. 393, sec. 519.

Utah.—Same. Comp. Laws, sec. 2728.

§ 453. [1368.] Legacies, when Due.—Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease.

Idaho. — Same. Rev. Stats., sec. 5756.

Montana. — Same. Comp. Stats., p. 393, sec. 520.

Utah. — Same. Comp. Laws, sec. 2729.

A legacy payable from the first money realized from the estate by the executors after the payment of all testator's debts and funeral expenses does not become due and payable, and consequently does not bear interest, until after the debts and funeral expenses have been paid: *In re James*, 65 Cal. 25.

§ 454. [1869.] Interest. — Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease.

See note to last section.

Montana. — Same. Comp. Stats., p. 393, sec. 521.

Utah. — Same. Comp. Laws, sec. 2730.

§ 455. [1870.] Construction of These Rules. — The four preceding sections are in all cases to be controlled by a testator's express intention.

Montana. — Same. Comp. Stats., p. 393, sec. 522.

Utah. — Same. Comp. Laws, sec. 2731.

§ 456. [1871.] Executor According to the Tenor. — Where it appears, by the terms of a will, that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor.

Montana. — Same. Comp. Stats., p. 393, sec. 523.

Utah. — Same. Comp. Laws, sec. 2732.

The appointment of an executor is not essential to the validity of a will: *In re Barton*, 52 Cal. 538; *Clarke v. Ransom*, 50 Cal. 595. **Proof extrinsic to a will may be made to show who testator intended to nominate as executor:** *In re Colette*, Myr. Prob. 116.

§ 457. [1872.] Power to Appoint is Invalid. — An authority to an executor to appoint an executor is void.

Montana. — Same. Comp. Stats., p. 394, sec. 524.

Utah. — Same. Comp. Laws, sec. 2733.

§ 458. [1873.] Executor not to Act till Qualified. — No person has any power, as an executor, until he qualifies, except that, before letters have been issued, he may pay funeral

charges and take necessary measures for the preservation of the estate.

Idaho. — Same. Rev. Stats., sec. 5757.

Montana. — Same. Comp. Stats., p. 394, sec. 525.

Utah. — Same. Comp. Laws, sec. 2734.

§ 459. [1374.] Provisions as to Revocations. — The provisions of this title in relation to the revocation of wills apply to all wills made by any testator living at the expiration of one year from the time it takes effect.

Idaho. — Same. Rev. Stats., sec. 5758.

Montana. — Same. Comp. Stats., p. 394, sec. 526.

Utah. — Same. Comp. Laws, sec. 2735.

§ 460. [1375.] Execution and Construction of Prior Wills not Affected. — The provisions of this title do no impair the validity of the execution of any will made before it takes effect, or affect the construction of any such will.

Idaho. — Same. Rev. Stats., sec. 5759.

Montana. — Same. Comp. Stats., p. 394, sec. 527.

Utah. — Same. Comp. Laws, sec. 2736.

A will is to be construed under the statute in force at the time it was made: *In re Pfuelb*, 48 Cal. 643.

§ 461. [1376.] The Law of What Place Applies. — The validity and interpretation of wills, wherever made, are governed, when relating to property within this state, by the law of this state.

Idaho. — Same. Rev. Stats., sec. 5760.

Montana. — Same. Comp. Stats., p. 394, secs. 528, 529.

Utah. — Same. Comp. Laws, sec. 2737.

§ 462. [1377.] Liability of Beneficiaries for Testator's Obligations. — Those to whom property is given by will are liable for the obligations of the testator in the cases and to the extent prescribed by the Code of Civil Procedure.

Montana. — Same. Comp. Stats., p. 394, sec. 530.

Utah. — Same. Comp. Laws, sec. 2738.

“Those who succeed to the property of a decedent are liable for all his obligations in the cases and to the extent prescribed by the act relating to procedures of probate courts in the settlement of estates.” Comp. Laws, sec. 2760.

CHAPTER XVII.

SUCCESSION AND ESCHEAT.

ARTICLE I.

SUCCESSION.

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- § 465. Succession to and distribution of property.
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- § 470. Same.
- § 471. Same.
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- § 484. Succession not claimed — Duty of attorney-general.
- § 485. When the property and estate escheat to the state.
- § 486. Property escheated subject to charges as other property.
- § 487. Successor liable for decedent's obligations.

§ 463. [1383.] **Succession Defined.** — Succession is the coming in of another to take the property of one who dies without disposing of it by will.

Idaho. — Same. Rev. Stats., sec. 5700.

Montana. — Same. Comp. Stats., p. 395, sec. 531.

Utah. — Same. Comp. Laws, sec. 2739.

The inheritance is regulated by the law in force at the time of the death: *Rich v. Tubbs*, 41 Cal. 34.

An estate acquired by inheritance is one that descends upon the heir and is cast upon him by the operation of law. A devisee does not inherit, but takes by purchase: *In re Donahue*, 36 Cal. 329.

As to vesting of title to personal property, see *Jahns v. Nolting*, 29 Cal. 507.

When both husband and wife perish in the same calamity, no presumption of survivorship of the wife

arises from the fact that the order of court granting letters of administration upon her estate recites that she was "the surviving wife" of her husband. In a proceeding by her administrator to set aside the probate of her husband's will, it is error to refuse evidence *aliunde* upon the question of survivorship: *Sanders v. Simcich*, '65 Cal. 50. See also Cal. Code Civ. Proc., sec. 1963, subd. 40, for presumptions in regard to survivorship.

Descent and distribution: See *Eversdon v. Mayhew*, 57 Cal. 144.

§ 464. [1384.] Who First Succeeds to Possession of Estates not Devised, and for What Purpose.—

The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate [superior] court, and to the possession of any administrator appointed by that court, for the purposes of administration.

Idaho. — Same. Rev. Stats., sec. 5701..

Montana. — Same. Comp. Stats., p. 395, sec. 532.

Oregon. — "The real property of the deceased is the property of those to whom it descends by law or is devised by will, subject to the possession of the executor or administrator, and to be applied to the satisfaction of claims against the estate, as by this chapter provided; but upon the settlement of the estate and the termination of the administration thereof, so much of such real property as remains unsold or unappropriated is discharged from such possession and liability without any order or decree therefor. But if there be any surplus of the proceeds of the sale of such real property, or any part thereof, the court, or judge thereof, shall order and direct a distribution of such surplus among those who would have been entitled to such land if the same had not been sold." Hill's Laws, sec. 1192.

Utah. — Same as California. Comp. Laws, sec. 2740.

The interest of a deceased in mining ground can only pass by deed or will; and in the absence of both of these, it vests in the heirs of the deceased: *Hardenbergh v. Bacon*, 33 Cal. 356.

A possessory interest in public land may descend among the effects of a deceased person to his executor or administrator, and may be conveyed by a regular sale to another: *Grover v. Hawley*, 5 Cal. 486.

The right of possession which a person held in the pueblo lands of San

Francisco prior to the passage of the Van Ness ordinance descended to his heirs, and could be distributed by the court: *McLeran v. Benton*, 43 Cal. 467.

Future contingent interests vests in beneficiary, so as to be the subject of succession: *In re Selna*, Myr. Prob. 233.

Quartz lodes descend and are distributed as other real property: *Carhart v. Mont. Mineral Co.*, 1 Mont. 245.

Section 1385, Civil Code, repealed March 30, 1874. Stats. 1873-74, p. 236.

§ 465. [1386.] Succession to and Distribution of Property. — When any person, having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this code and the Code of Civil Procedure, subject to the payment of his debts, in the following manner: —

1. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation.

2. If the decedent leave no issue, the estate goes, one half to the surviving husband or wife, and the other half to the decedent's father and mother, in equal shares, and if either be dead, the whole of said half goes to the other; if there be no father or mother, then one half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation. If the decedent leave no issue, nor husband nor wife, the estate must go to his father and mother, in equal shares, or if either be dead, then to the other.

3. If there be neither issue, husband, wife, father, nor mother, then in equal shares to the brothers and sisters of the decedent,

and to the children of any deceased brother or sister by right of representation.

4. If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife.

5. If the decedent leave neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestors must be preferred to those claiming through an ancestor more remote.

6. If the decedent leave several children, or one child, and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

7. If at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parents descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation.

8. If the decedent be a widow or widower, and leave no kindred, and the estate, or any portion thereof, was common property of such decedent, and his or her deceased spouse, while such spouse was living, such common property shall go to the father of such deceased spouse, or if he be dead, to the mother. If there be no father nor mother, then such property shall go to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brother or sister of such deceased spouse, by right of representation.

9. If the decedent leave no husband, wife, or kindred, and there be no heirs to take his estate, or any portion thereof,

under subdivision eight of this section, the same escheats to the state for the support of common schools.

"A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." Cal. Civ. Code, sec. 228.

"All property, real and personal, within the limits of this state which does not belong to any person, belongs to the people. Whenever the title to any property fails for want of heirs or next of kin, it reverts to the people." Cal. Pol. Code, sec. 41.

Arizona. — "Where any person, having title to any estate of inheritance, real, personal, or mixed, shall die intestate as to such estate, and shall leave no surviving husband or wife, it shall descend and pass in parcenary to his kindred, male and female, in the following course; that is to say: 1. To his children and their descendants. 2. If there be no children nor their descendants, then to his father and mother, in equal portions. But if only the father or mother survive the intestate, then his estate shall be divided into two equal portions, one of which shall pass to such survivor, and the other half shall pass to the brothers and sisters of the deceased, and to their descendants; but if there be none such, then the whole estate shall be inherited by the surviving father or mother. 3. If there be neither father nor mother, then the whole of such estate shall pass to the brothers and sisters of the intestate, and to their descendants. 4. If there be none of the kindred aforesaid, then the inheritance shall be divided into two moieties, one of which shall go to the paternal and the other to the maternal kindred in the following course, that is to say, to the grandfather and grandmother in equal portions, but if only one of these be living, then the estate shall be divided into two equal parts, one of which shall go to the survivor, and the other shall go to the descendant, or descendants of such deceased grandfather or grandmother. If there be no such descendants, then the whole estate shall be inherited by the surviving grandfather or grandmother. If there be no surviving grandfather or grandmother, then the whole of such estate shall go to their descendants, and so on without end, passing in like manner to the nearest lineal ancestors and their descendants." Rev. Stats., sec. 1459.

"Where any person, having title to any estate of inheritance, real, personal, or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows: 1. If the deceased have a child or children, or their descendants, the surviving husband or wife shall take one third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased, and their descendants. The surviving husband or wife shall also be entitled to an estate for life in one third of the land of the intestate, with remainder to the child or children of the intestate and their descendants. 2. If the deceased have no child or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate and to one half of the lands of the intestate, without remainder to any person, and the other half shall pass and

be inherited according to the rules of descent and distribution; *provided, however*, that if the deceased have neither surviving father or mother, then the surviving husband or wife shall be entitled to the whole of the estate of such intestate." Rev. Stats., sec. 1460.

"There shall be no distinction in regulating the descent and distribution of the estate of a person dying intestate between property which may have been derived by gift, devise, or descent from the father and that which may have been derived by gift, devise, or descent from the mother, and all the estate to which such intestate may have had title at the time of death shall descend and vest in the heirs of such person in the same manner as if he had been the original purchaser thereof; *provided, however*, that if such intestate was the legally adopted heir of another, and dies, leaving no surviving husband or wife, and no children, then so much of his estate as was obtained by gift, devise, or descent from the person adopting him shall descend to the person and heirs of the person who adopted such intestate." Rev. Stats., sec. 1461.

"Where the children of the intestate's brothers and sisters, uncles and aunts, or any other relations of the deceased, standing in the same degree, come into partition, they shall take *per capita*, that is to say, by persons, and where a part of them being dead and a part living, the issue of those dead have right to partition, such issue shall take *per stirpes*, or by stocks, that is to say, the shares of their deceased parents." Rev. Stats., sec. 1466.

"No conviction shall work corruption of blood or forfeiture of estate, nor shall there be any forfeiture by reason of death by casualty, and the estates of those who destroy their own lives shall descend or vest as in case of natural death." Rev. Stats., sec. 1463.

"Where two or more persons hold an estate, real, personal, or mixed, jointly, and one joint owner dies before severance, his interest in said joint estate shall not survive to the remaining joint owners, but shall descend to and be vested in the heirs and legal representatives of such deceased joint owner, in the same manner as if his interest had been severed and ascertained." Rev. Stats., sec. 1469.

Same as section 228 of California Civil Code, *supra*. Rev. Stats., sec. 1390.

Idaho. — Same as California. Rev. Stats., sec. 5702.

Same as section 228 of California Civil Code, *supra*. Rev. Stats., sec. 2552.

Montana. — "When any person, having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this code and the Code of Civil Procedure, subject to the payment of his debts, in the following manner: 1. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living, or one child living, and the lawful issue of one or more deceased children, one third to the husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of his representation; but if there be no child of the decedent living at his death, the remainder goes to all his lineal descendants; and if all of the descendants are in the same decree

of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living, and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and to the issue of the deceased child or children, by right of representation. 2. If the decedent leave no issue, then the estate goes in equal shares to the surviving husband or wife, and to the decedent's father. If there be no father, then one half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. If he leave a mother also, she takes in equal share with the brothers and sisters. If the decedent leave no issue, nor husband nor wife, the estate must go to the father. 3. If there be no issue, nor husband nor wife, nor father, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. If a mother survive, she takes in equal share with the brothers and sisters; 4. If the decedent leave no issue, nor husband nor wife, nor father, and no brother nor sister is living at the time of his death, the estate goes to his mother, to the exclusion of the issue, if any, of deceased brothers or sisters. 5. If the decedent leave a surviving husband or wife, and no issue, and no father nor mother, nor brother nor sister, the whole goes to the surviving husband or wife. 6. If the decedent have no issue, nor husband nor wife, and no father nor mother, nor brother nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestors must be preferred to those claiming through an ancestor more remote; however, 7. If the decedent leave several children, or one child, and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation. 8. If, at the death of such child who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation." Comp. Stats., p. 395, sec. 534.

"If the decedent leave no husband, wife, or kindred, the estate escheats to the territory." Comp. Stats., p. 397, sec. 535.

Same as section 228 of California Civil Code, *supra*. Comp. Stats., p. 588, sec. 8.

Nevada. — "When any person, having title to any estate not otherwise limited by marriage contract, shall die intestate as to such estate, it shall descend and be distributed, subject to the payment of his or her debts, in the following manner: 1. If there be a surviving husband or wife, and only one

child, or the lawful issue of one child, in equal shares to the surviving husband or wife, and child, or issue of such child. If there be a surviving husband or wife, and more than one child living, or one child living, and the lawful issue of one or more deceased children, one third to the surviving husband or wife, and the remainder in equal shares to his or her children, and to the lawful issue of any deceased child, by right of representation. If there be no child of the intestate living at his or her death, the remainder shall go to all of his or her lineal descendants; and if all the said descendants are in the same degree of kindred to the intestate, they shall share equally, otherwise they shall take according to the right of representation. 2. If he or she shall leave no issue, the estate shall go in equal shares to the surviving husband or wife, and to the intestate's father. If he or she shall leave no issue, or husband or wife, the estate shall go to his or her father. 3. If there be no issue, nor husband nor wife, nor father, then in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister, by right of representation; *provided*, that if he or she shall leave a mother also, she shall take an equal share with the brothers and sisters. 4. If the intestate shall leave no issue, nor husband nor wife, nor father, and no brother or sister living at his or her death, the estate shall go to his or her mother, to the exclusion of the issue, if any, of deceased brothers or sisters. 5. If the intestate shall leave a surviving husband or wife, and no issue, and no father, mother, brother, or sister, the whole estate shall go to the surviving husband or wife. 6. If the intestate shall leave no issue, nor husband nor wife, and no father, mother, brother, nor sister, the estate shall go to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestors shall be preferred to those claiming through an ancestor more remote; *provided, however*, 7. If any person shall die, leaving several children, or leaving one child, and the issue of one or more other children, and any such surviving child shall die under age, and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent shall descend in equal shares to the other children of the same parent, and to the issue of any such other children who shall have died, by right of representation. 8. If, at the death of such child, who shall die under age, and not having been married, all the other children of his said parent shall also be dead, and any of them shall have left issue, the estate that came to such child by inheritance from his said parent shall descend to all the issue of other children of the same parent; and if all the said issue are in the same degree of kindred to said child, they shall share the said estate equally, otherwise they shall take according to the right of representation. 9. If the intestate shall leave no husband or wife, nor kindred, the estate shall escheat to the territory for the support of common schools." Gen. Stats., sec. 2981. P. 2. 2

Same as section 228 of California Civil Code, *supra*. Gen. Stats., sec. 606.

Oregon. — "When any person shall die seised of any real property, or any right thereto, or entitled to any interest therein, in fee-simple, or for the life of another, not having lawfully devised the same, such real property shall descend, subject to his debts, as follows: 1. In equal shares to his or her children,

and to the issue of any deceased child by right of representation; and if there be no child of the intestate living at the time of his or her death, such real property shall descend to all his or her other lineal descendants; and if such descendants are in the same degree of kindred to the intestate, they shall take such real property equally, or otherwise they shall take according to the right of representation. 2. If the intestate shall leave no lineal descendant such real property shall descend to his wife; or if the intestate be a married woman and leave no lineal descendants, then such real property shall descend to her husband; and if the intestate leave no wife nor husband, then such real property shall descend to his or her father. 3. If the intestate shall leave no lineal descendants, neither husband nor wife, nor father, such real property shall descend in equal shares to the brother and sister of the intestate, and to the issue of any deceased brother or sister by right of representation; but if the intestate shall leave a mother also, she shall take an equal share with such brother and sisters. 4. If the intestate shall leave no lineal descendants, neither husband nor wife, nor father, brother, nor sister, living at his or her death, such real property shall descend to his mother, to the exclusion of the issue of the deceased brothers or sisters of the intestate. 5. If the intestate shall leave no lineal descendants, neither husband nor wife, nor father, mother, brother nor sister, such real property shall descend to his or her next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through a more remote ancestor. 6. If the intestate shall leave one or more children, and the issue of one or more deceased children, and any of such surviving children shall die under age without having been married, all such real property that came to such deceased child by inheritance from such intestate shall descend in equal shares to the other children of such intestate and to the issue of any other children of such intestate who shall have died, by right of representation; but if all the other children of such intestate shall be also dead, and any of them shall have left issue, such real property so inherited by such deceased child shall descend to all the issue of such other children of the intestate in equal shares, if they are in the same degree of kindred to such deceased child, otherwise they shall take by right of representation. 7. If the intestate shall leave no lineal descendants or kindred, such real property shall escheat to the state of Oregon. Hill's Laws, sec. 3098.

“When any person shall die possessed of any personal property, or of an interest therein, not having lawfully bequeathed the same, such personal property shall be applied and distributed as follows: 1. If the intestate shall leave a widow, she shall be allowed all articles of her apparel and ornament, according to the degree and estate of the intestate, and such property and provisions, for the use and support of herself and minor children, shall be allowed and ordered in pursuance of title 4 of chapter 15 of the Code of Civil Procedure; and this allowance shall be made as well when the widow waives the provision made for her in the will of her husband as when he dies intestate. 2. The personal property of the intestate remaining after such allowance shall be applied to the payment of the debts of the deceased

and the charges and expenses of administration as provided by law. 3. The residue, if any, of the personal property shall be distributed among the persons who would be entitled to the real property of the intestate, as provided in this act, and in the like proportion or share, except as is herein otherwise provided. 4. If the intestate shall leave a husband, such husband shall be entitled to receive the whole of such residue of the personal property. 5. If the intestate leave a widow and issue, such widow shall be entitled to receive one half of such residue of the personal property; but if the intestate leave a widow and no issue, such widow shall be entitled to receive the whole of such residue of the personal property. 6. If there be no husband, widow, or kindred of the intestate, the whole of such residue shall escheat to the state of Oregon." Hill's Laws, sec. 3099.

"A child so adopted shall be deemed, for the purposes of inheritance of such child, and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them by lawful wedlock, except that he shall not be capable of taking property expressly limited to heirs of the body or bodies of the parent by adoption, nor property from the lineal or collateral kindred of such parents by right of representation." Hill's Laws, sec. 2943.

"If, in a petition for the adoption of a child, a change of the child's name is requested, the court, upon decreeing the adoption, may also decree such change of name, and grant a certificate thereof." Hill's Laws, sec. 2949.

Utah. — Same, except that the word "lawful" is omitted from subdivision 1, and in subdivision 9, after the word "section," read as follows: "The same shall be disposed of in the manner provided in section 22 of this title for the disposal of estates of non-resident foreigners." Comp. Laws, sec. 2741.

"Whenever it shall be desirable, the party adopting such child may, by stipulations to that effect in such statement, adopt such child and bestow upon him or her equal rights, privileges, and immunities of children born in lawful wedlock." Comp. Laws, sec. 2576.

Washington. — "When any person shall die seised of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein in fee-simple or for the life of another, not having devised the same, they shall descend, subject to the debts, as follows: 1. If the decedent leaves a surviving husband or wife and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leaves a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child by right of representation. If there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. 2. If the decedent leaves no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father and mother, if both survive. If there be no father nor mother, then one half goes in equal shares to the brothers and

isters of the decedent, and to the children of any deceased brothers or sisters by right of representation. If decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother. 3. If there be no issue, nor husband nor wife, nor father and mother, nor either, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation. 4. If the decedent leaves a surviving husband or wife, and no issue, and no father nor mother, nor brother nor sister, the whole estate goes to the surviving husband or wife. 5. If the decedent leaves no issue, nor husband nor wife, and no father nor mother, nor brother nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestor must be preferred to those claiming through an ancestor more remote; however, 6. If the decedent leaves several children, or one child and the issue of one or more other children, and any such surviving child dies under age, and not having been married, all the estate that comes to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation. 7. If, at the death of such child who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally; otherwise they take according to the right of representation. 8. If the decedent leaves no husband, wife, or kindred, the estate escheats to the state, for the support of common schools in the county in which the decedent resided during lifetime, or where the estate may be situated." Gen. Stats., sec. 1480.

"When any person shall die possessed of any separate personal estate, or of any right or interest therein, not lawfully disposed of by his last will, the same shall be applied and distributed as follows: 1. The widow, if any, shall be allowed all articles of her apparel or ornament, according to the degree and estate of her husband, and such provisions and other necessities, for the use of herself and family under her care, as shall be allowed and ordered in pursuance of the provisions of any law; and this allowance shall be made as well when the widow receives the provision made for her in the will of her husband as when he dies intestate. 2. The personal estate remaining after such allowance shall be applied to the payment of the debts of the deceased, with the charges for the funeral and the settling of the estate. 3. The residue, if any, of the personal estate shall be distributed among the same persons as would be entitled to the real estate by section 1480 of this volume of General Statutes [*supra*], and in the same proportion as provided, excepting as herein further provided. 4. If the intestate leave a husband and issue, the husband shall be entitled to one half the residue. 5. If there be no issue, the husband shall be entitled to the whole of the residue. 6. If the intestate leave a widow and issue, the widow shall be entitled to one half of said residue. 7. If there be no issue, the widow shall be entitled to the whole of the

residue. 8. If there be no husband, widow, or kindred of the intestate, the said personal estate shall escheat to the state, for the use of common schools in the particular county in which the intestate shall have resided at time of death." Gen. Stats., sec. 1495.

"If partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but descend or pass by devise, and shall be subject to debts and other legal charges, or transmissible to executors or administrators, and be considered to every intent and purpose in the same view as if such deceased joint tenants had been tenants in common; *provided*, that community property shall not be affected by this section." Gen. Stats., sec. 1483.

"If any person, by last will, devise any real estate to any person for the term of such person's life, such devise vests in the devisee an estate for life, and without the remainder is specially devised to the heirs of said devisee, it shall revert to the heirs at law of the testator." Gen. Stats., sec. 1473.

"The word 'issue,' as used in this chapter, includes all the lawful lineal descendants of the ancestor." Gen. Stats., sec. 1493.

See *Beck v. Soward*, 76 Cal. 527.

The word "issue," in the above section, is used in the same sense as "child"; and sections 227 and 228, when construed with this section, entitle an adopted child to succeed to the estate of the adopting parent: *In re Newman*, 75 Cal. 213.

Occupancy of public lands under the pre-emption laws creates no inheritable title: *Buxton v. Traver*, 67 Cal. 171.

When an intestate has no issue, nor wife, nor father, mother, brother, nor sister; held, that his grandfather took the estate in preference to his uncle, as next of kin: *Smallman v. Powell*, 18 Or. 367.

Descendants of a person are children, grandchildren, and their children to the remotest degree: *Jewell v. Jewell*, 28 Cal. 232.

The word "children," where it

occurs in the third subdivision of section 1 of the statute of descents and distributions, does not include grandchildren, but is confined to the immediate offspring of a deceased brother or sister: *In re Curry*, 39 Cal. 529.

The term "children," when to be construed grandchildren: *In re Schedel*, 73 Cal. 594.

The wife dies leaving a husband and their two infant children; one died unmarried and without issue, — in such case the father inherits one third of the wife's separate estate, and the share of the deceased child is inherited by the other child, and not by the father: *In re De Castro*, 18 Cal. 96.

If a person dies intestate, owning property acquired by inheritance, the surviving mother will not inherit such property: *In re Donahue*, 36 Cal. 329.

§ 466. [1387.] **Illegitimate Children.** — Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his

parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother, respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate.

Arizona. — "Where a man having, by a woman, a child or children, and afterward intermarry with such woman, such child or children, if recognized by him, shall thereby be legitimized and made capable of inheriting his estate. The issue, also, of marriages deemed null in law shall nevertheless be legitimate." Rev. Stats., sec. 1470.

"Bastards shall be capable of inheriting from and through their mothers, and of transmitting estates, and shall also be entitled to distributive shares of the personal estate of any of their kindred, on the part of their mother, in like manner as if they had been lawfully begotten of such mother." Rev. Stats., sec. 1471.

Idaho. — Same. Rev. Stats., sec. 5703.

Montana. — Same. Comp. Stats., p. 397, sec. 536.

- **Nevada.** — "Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child; and shall in all cases be considered as heir of his mother; and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, shall have acknowledged him as aforesaid, or adopted him into his family, in which case such child and all the legitimate children shall be considered as brothers and sisters, and on the death of either of them, intestate, and without issue, the others shall inherit his estate, and be heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother, respectively, their rights in the estates of all the said children, as provided hereinbefore, in like manner as if all had been legitimate. The issue of all marriages deemed null in law, or dissolved by divorce, shall be legitimate." Gen. Stats., sec. 2982.

Oregon. — "An illegitimate child shall be considered an heir of its mother, and shall inherit or receive her property, real or personal, in whole or in part, as the case may be, in like manner as if such child had been born in lawful wedlock; but such child shall not be entitled to inherit or receive, as representing his mother, any property, real or personal, of the kindred, either

lineal or collateral, of such mother; *provided*, that when the parents of such child have formally married, and lived and cohabited as husband and wife, such child shall not be regarded as illegitimate within the meaning of this act, although such formal marriage shall be adjudged to be void." Hill's Laws, sec. 3101.

"If an illegitimate child shall die intestate, without leaving a widow, husband, or lawful issue, the property, real and personal, of such intestate shall descend to or be received by his mother; but if, after the birth of an illegitimate child, the parents thereof shall intermarry, such child shall be considered legitimate to all intents and purposes." Hill's Laws, sec. 3102.

Utah. — "Every illegitimate child is an heir of the person who acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock. The issue of all marriages null in law, or dissolved by divorce, are legitimate." Comp. Laws, sec. 2742.

Washington. — Same as California, except that the last sentence is omitted; also, the word "and" is substituted for the word "or," between the words "child" and "adopts." Gen. Stats., sec. 1484.

Sabra Magee had two legitimate daughters, — Eliza and Susan. Eliza's descendants were all legitimate. Susan had two illegitimate daughters, Elizabeth and Suez. Elizabeth died after her mother, leaving one legitimate child, Albert. Suez died subsequently, intestate, and without issue. Eliza's descendants claim her estate as against Albert. It was held, upon a construction of sections 1386, 1387, and 1388 of the California Civil Code (§§ 465-467), that Albert is entitled to succeed to the estate of Suez as an heir of Susan, the mother of Elizabeth and Suez: *In re Magee*, 63 Cal. 414.

Every illegitimate child inherits from its mother, the same as if born in lawful wedlock: *In re Magee*, 63 Cal. 414.

Terms of kindred include only

those who are legitimate, unless a different intention is manifest: *In re Magee*, 63 Cal. 414.

As to legitimization of children of marriages null in law or dissolved by divorce, see *Graham v. Bennett*, 2 Cal. 503.

Illegitimate half-brother by the father's side cannot be an heir; illegitimate half-sisters by the mother's side inherit: *In re Harrison*, Myr. Prob. 121.

Acts of paramour in recognition of his paternity of the spurious offspring of an adulterous wife cannot be deemed an adoption, so as to entitle such child to inherit from him: *In re Sbarboro*, Myr. Prob. 255.

Statutes concerning adoption of illegitimate children are to be strictly construed: *In re Jessup*, 81 Cal. 408.

§ 467. [1388.] The Mother is Successor to Illegitimate Child. — If an illegitimate child; who has not been acknowledged or adopted by his father, dies intestate, without lawful issue, his estate goes to his mother, or in case of her decease, to her heirs at law.

Arizona. — See Rev. Stats., sec. 1471, under last section.

Idaho. — Same as California. Rev. Stats., sec. 5704.

Montana. — Same as California. Comp. Stats., p. 397, sec. 537.

Nevada. — "If any illegitimate child shall die intestate, without lawful

issue, his estate shall descend to his mother, or, in case of her decease, to her heirs at law." Gen. Stats., sec. 2983.

Oregon. — See Hill's Laws, sec. 3102, under last section.

Utah. — Same as California, with the following omitted: "Who has not been acknowledged or adopted by his father." Comp. Laws, sec. 2743.

Washington. — Same as California. Gen. Stats., sec. 1485.

§ 468. [1389.] Degrees of Kindred, how Computed. — The degree of kindred is established by the number of generations, and each generation is called a degree.

Idaho. — "The degrees of kindred are computed according to the rules of the civil law. Kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance." Rev. Stats., sec. 5705.

Montana. — Same. Comp. Stats., p. 397, sec. 538.

Nevada. — "The degrees of kindred shall be computed according to the rules of the civil law, and kindred of the half-blood shall inherit equally with those of the whole blood, in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance." Gen. Stats., sec. 2984.

Oregon. — "The degrees of kindred shall be computed according to the rules of the civil law, and the kindred of the half-blood shall inherit or receive equally with those of the whole blood in the same degree." Hill's Laws, sec. 3103.

Utah. — Same as California. Comp. Laws, sec. 2744.

Washington. — Same as California. Gen. Stats., sec. 1486.

The common law is the rule of where the civil-law rule of computation applies; *People v. De la Guerra*, 24 Cal. 73.
decision in this state in computing the degrees of consanguinity, except in relation to descent and distribution,

§ 469. [1390.] Same. — The series of degrees forms the line; the series of degrees between persons who descend from one another is called direct or lineal consanguinity; and the series of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the collateral line or collateral consanguinity.

Montana. — Same. Comp. Stats., p. 398, sec. 539.

Utah. — Same. Comp. Laws, sec. 2745.

§ 470. [1391.] Same. — The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects the ancestors with those who descend

from him. The second is that which connects a person with those from whom he descends.

Montana. — Same. Comp. Stats., p. 390, sec. 540.

Utah. — Same. Comp. Laws, sec. 2746.

§ 471. [1392.] **Same.** — In the direct line there are as many degrees as there are generations. Thus the son is, with regard to the father, in the first degree; the grandson in the second, and *vice versa* with regard to the father and grandfather toward the sons and grandsons.

Montana. — Same. Comp. Stats., p. 398, sec. 541.

Utah. — Same. Comp. Laws, sec. 2747.

The grandfather is one degree put by the civil law: *Smallman v. nearer of kin than the uncle*, as com- *Powell*, 18 Or. 367.

§ 472. [1393.] **Same.** — In the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus brothers are related in the second degree; uncle and nephew in the third degree; cousins-german in the fourth, and so on.

Montana. — Same. Comp. Stats., p. 398, sec. 542.

Utah. — Same. Comp. Laws, sec. 2748.

§ 473. [1394.] **Relatives of the Half-blood.** — Kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance.

Arizona. — "In cases before mentioned, where the inheritance is directed to pass to the collateral kindred of the intestate, if part of such collateral kindred be of the whole blood, and the other part of the half-blood only of the intestate, those of the half-blood shall inherit only half so much as those of the whole blood, but if all be of the half-blood, they shall have whole portions. Rev. Stats., sec. 1462.

Montana. — Same as California. Comp. Stats., p. 398, sec. 543.

Nevada. — See Gen. Stats., sec. 2984, under § 468, *ante*.

Oregon. — See Hill's Laws, sec. 3103, under § 468, *ante*.

Utah. — Same as California. Comp. Laws, sec. 2749.

Illegitimate half-brother by the father's side cannot be an heir; illegitimate half-sisters by the mother's side inherit: *In re Harrison*, Myr. Prob. 121.

§ 474. [1895.] Advancements Constitute Part of Distributive Share.—Any estate, real or personal, given by the decedent in his lifetime, as an advancement to any child, or other lineal descendant, is a part of the estate of the decedent, for the purposes of division and distribution thereof among his issue, and must be taken by such child, or other lineal descendant, toward his share of the estate of the decedent.

Arizona.—“When any of the children of a person dying intestate, or their issue, shall have received from such intestate in his lifetime any real, personal, or mixed estate by way of advancement, and shall choose to come into partition and distribution of the estate with the other distributees, such advancement shall be brought into hotchpot with the whole estate, and such party returning such advancement shall thereupon be entitled to his proper portion of the whole estate; *provided*, that it shall be sufficient to account for the value of the property so brought into hotchpot at the time it was advanced.” Rev. Stats., sec. 1465.

Idaho.—Same as California. Rev. Stats., sec. 5706.

Montana.—Same as California. Comp. Stats., p. 398, sec. 544.

Nevada.—Same as California, except that “intestate” is substituted for “decedent” wherever it occurs. Gen. Stats., sec. 2985.

Oregon.—Same as California. Hill’s Laws, sec. 3104.

“If the intestate leave a widow and issue, and any of such issue shall have received an advancement from the intestate in his lifetime, the value of such advancement shall not be taken into consideration in computing the part to be given to the widow, but such widow shall only be entitled to receive the one half of such residue, after deducting the value of such advancement.” Hill’s Laws, sec. 3100.

Utah.—Same as California. Comp. Laws, sec. 2750.

Washington.—Same as California. Gen. Stats., sec. 1487.

§ 475. [1896.] Advancements, when Too Much or not Enough.—If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement; and if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent.

Arizona.—See Rev. Stats., sec. 1465, under last section.

Idaho.—Same. Rev. Stats., sec. 5707.

Montana.—Same. Comp. Stats., p. 398, sec. 545.

Nevada.—Same. Gen. Stats., sec. 2986.

Oregon.—Same. Hill’s Laws, sec. 3105.

"If any such advancement is made in real property, the value thereof shall, for the purposes of the last section, be considered as part of the real property to be divided; and if the advancement be either in real or personal property, and shall in either case not exceed the share or portion of such real or personal property that would come to the heir so advanced, such heir shall not refund any part of it, but shall take or receive so much less out of the whole part of the estate, as the case may be, as will make the whole share equal to those of the other heirs who are in the same degree with the heir so advanced." Hill's Laws, sec. 3106.

Utah. — Same as California. Comp. Laws, sec. 2451.

Washington. — Same as California. Gen. Stats., sec. 1488.

"If any such advancement shall have been made in real estate, the value thereof shall, for the purposes of the preceding section, be considered as part of the real estate to be divided, and if it be in personal estate, and if in either case it shall exceed the share of real or personal estate respectively that would have come to the heir so advanced, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make the whole share equal to those of the other heirs who are in the same degree with him." Gen. Stats., sec. 1489.

"If the intestate leave a widow and issue, and any relation have received an advancement from the intestate in his lifetime, the value of such advancement shall not be taken into consideration in computing the one-half part to be assigned to the widow, but she shall be entitled to the one-half part only of the said residue, after deducting the value of the advancement." Gen. Stats., sec. 1496.

§ 476. [1397.] What are Advancements. — All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such, by the child or other successor or heir.

Idaho. — Same. Rev. Stats., sec. 5708.

Montana. — Same. Comp. Laws, p. 399, sec. 546.

Nevada. — Same, except that "descendant" is substituted for "successor or heir." Gen. Stats., sec. 2987.

Oregon. — Same as California. Hill's Laws, sec. 3107.

Utah. — Same. Comp. Laws, sec. 2752.

Washington. — Same. Gen. Stats., sec. 1490.

Advances to heir in lifetime: *In re Low*, Myr. Prob. 143.

The legacies are cumulative when, in a will, testator, after making certain devises, says, "And I hereby declare that any advancements that I may hereafter personally make to the above-mentioned legatees, or to either of them, shall be deemed a partial satisfaction of said legacy, equal

in amount to the sum so advanced," if afterwards, in a codicil, he makes other devises to the same legatees, and adds: "All bequests which I have made, or which I shall make, by this last testamentary disposition, is expressly confirmed, whether these bequests are given to relatives, strangers, or for charitable purposes and institutions. Likewise any testamentary

papers written or subscribed by me the same name, decided November 12, shall have the same effect as if they 1887, on the authority of said case (not were here incorporated": *In re Zeile*, reported). 74 Cal. 125; also two other cases of

§ 477. [1398.] Value of Advancements, how Determined.—If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise it must be estimated according to its value when given, as nearly as the same can be ascertained.

Idaho.—Same. Rev. Stats., sec. 5709.

Montana.—Same. Comp. Stats., p. 399, sec. 547.

Nevada.—Same. Gen. Stats., sec. 2988.

Oregon.—Same. Hill's Laws, sec. 3108.

Utah.—Same. Comp. Laws, sec. 2753.

Washington.—Same. Gen. Stats., sec. 1491.

§ 478. [1399.] When Heir Advanced to Dies before Decedent.—If any child, or other lineal descendant, receiving advancement, dies before the decedent, leaving issue, the advancement must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them.

Idaho.—Same. Rev. Stats., sec. 5710.

Montana.—Same. Comp. Stats., p. 399, sec. 548.

Nevada.—Same. Gen. Stats., sec. 2989.

Oregon.—Same. Hill's Laws, sec. 3109.

Utah.—Same. Comp. Laws, sec. 2754.

"If the decedent leave no issue, nor husband nor wife, and the mother be living, the estate goes to the mother. If the decedent leave an estate which came to him as an advancement from his father, and he be living, such estate goes to the father." Comp. Laws, sec. 2756.

Washington.—Same as California. Gen. Stats., sec. 1492.

§ 479. [1400.] Inheritance of Husband and Wife from Each Other.—The provisions of the preceding sections of this title, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents.

Idaho. — Same. Rev. Stats., sec. 5711.

Montana. — Same. Comp. Stats., p. 399, sec. 549.

Nevada. — Same. Gen. Stats., sec. 2990.

Oregon. — "Nothing contained in this chapter shall affect or impair the estate of a husband as tenant by the curtesy, nor that of a widow as tenant in dower." Hill's Laws, sec. 3110.

Utah. — Same as California. Comp. Laws, sec. 2755.

Washington. — "The provisions of section 1480 [§ 465, *ante*] of this volume of General Statutes, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents, and take the place of tenancy in dower and tenancy by curtesy, which are hereby abolished." Gen. Stats., sec. 1482.

For section 1480, see § 477, *ante*.

§ 480. [1401.] Distribution of Common Property on Death of Wife. — Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her, by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition goes to her descendants, or heirs, exclusive of her husband.

Arizona. — "Upon the dissolution of the marriage relation by death, all the common property belonging to the community estate of the husband and wife shall go to the survivor, if the deceased have no child or children; but if the deceased have a child or children, his survivors shall be entitled to one half of said property, and the other half shall pass to the child or children of the deceased." Rev. Stats., sec. 1467.

"In every case the community estate passes charged with the debts against it." Rev. Stats., sec. 1468.

Idaho. — Same as California. Rev. Stats., sec. 5712.

Montana. — Same as California. Comp. Stats., p. 399, sec. 550.

Nevada. — "Upon the death of the wife, the entire community property belongs, without administration, to the surviving husband, except that in case the husband shall have abandoned his wife and lived separate and apart from her without such cause as would have entitled him to a divorce, the half of the community property, subject to the payment of its equal share of the debts chargeable to the estate owned in community by the husband and wife, is at her testamentary disposition in the same manner as her separate property, and in the absence of such disposition goes to her descendants equally, if such descendants are in the same degree of kindred to the decedent; otherwise according to the right of representation; and in the absence of both such disposition and such descendants, goes to her other heirs at law, exclusive of her husband." Gen. Stats., sec. 508.

Washington. — "Upon the death of either husband or wife, one half of

the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject, also, to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration." Gen. Stats., sec. 1481.

Land the title to which is taken in a wife's name, but which is paid for with community funds, is community property, and after the death of the wife belongs to the surviving husband, without administration, and the estate of the wife takes no title or interest in it which can be conveyed to any person: *Dean v. Parker*, 88 Cal. 283.

If, under the statute, the title of the husband is divested upon the death of the wife as to any portion of the common property, such title passes directly to the descendants of the wife, and they take it subject to be absorbed in the payment of community debts: *Packard v. Arellanes*, 17 Cal. 525.

Community funds expended upon separate estate do not make it community property, but constitutes a charge upon such separate estate: *In re Patton*, Myr. Prob. 241.

Where premiums paid upon an endowment life policy are part separate and part community funds, the proceeds received from the policy must be considered of a like character, in proportion to the funds used: *In re Webb*, Myr. Prob. 93.

An insurance policy paid for out of husband's earnings is community property: *In re Staus*, Myr. Prob. 5.

The estate in expectancy of the

wife in the community property is dependent upon her survivorship, and in the event of her death before her husband, it is deemed never to have existed. The husband does not, upon the death of his wife, as to the community property, take by descent or succession, but holds the community property as though acquired by himself, and as if his deceased wife had never existed: *In re Rowland*, 74 Cal. 523.

Demand of husband to have property in the hands of deceased wife's executor declared community property and delivered to him amounts to a claim against her estate, and should be presented as such: *In re Rowland*, 74 Cal. 523.

The wife's interest in the community property is not subject to administration under the laws of this state: *In re Pacheco*, 23 Cal. 476.

The male will be presumed to have survived under the California Code of Civil Procedure, section 1963, subdivision 40, where husband and wife were both murdered, and their house, in which their bodies were left, set on fire and burned, and there was no proof as to which had actually expired first, and the trial court properly adjudged that the entire community property belonged to the heirs of the husband: *Hollister v. Cordero*, 76 Cal. 649.

§ 481. [1402.] Distribution of Common Property on Death of the Husband.—Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise according

to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration.

"All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is, that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and her husband, or to her and any other person, the presumption is, that the married woman takes the part conveyed to her as tenant in common, unless a different intention is expressed in the instrument; and the presumption in this section mentioned is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration." Cal. Civ. Code, sec. 164.

Arizona. — See sections 1467, 1468, under preceding section.

Idaho. — Same as California, sec. 1402, *supra*. Rev. Stats., sec. 5713.

Montana. — Same as California, sec. 1402, *supra*. Comp. Laws, p. 399, sec. 551.

Nevada. — "Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his surviving children equally, and in the absence of both such disposition and surviving children, the entire community property belongs, without administration, to the surviving wife, except as hereinafter provided, subject, however, to all debts contracted by the husband during his life that were not barred by the statute of limitation at the time of his death; . . . in case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and charges and expense of administration; *provided, however*, that if, in the absence of said testamentary disposition, the surviving wife and children, and in the absence of such children the wife, shall pay, or cause to be paid, all indebtedness legally due from said estate, . . . then and in such case the said community property shall not be subject to administration." Gen. Stats., sec. 509.

"My estate," in husband's will, means estate subject to his testamentary disposition. A renunciation of "all claim to my estate except under this will" is not a renunciation of widow's share of community property: *In re Mumford*, Myr. Prob. 133.

A husband's will, as against his widow, can pass title to only one half of the community property: *In re Gwin*, 77 Cal. 313.

A widow is not estopped to make an election by causing a will which devises the entire community property to be probated and becoming the executrix thereof: *In re Gwin*, 77 Cal. 313.

One half of community property goes to wife upon death of her husband, and one half to the surviving children: *Gage v. Downey*, 79 Cal. 140.

A general devise of all the property of which the testator may die possessed, without naming any specific property, applies only to his moiety of the community property: *In re Gilmore*, 81 Cal. 240.

It is only where there is such a clear manifestation of intent to devise the whole community property as to overcome the presumptions against a general devise of all the testator's property, that the widow can be put to her election to take under the will, or to take what she is entitled to by law. Where there is no such manifest intent, the widow may claim and take both what the law gives her in the community property, and also what the will of the husband gives her in the portion thereof subject to his testamentary disposition: *In re Gilmore*, 81 Cal. 240.

A widow who has taken, by virtue of the will, more than one half of the whole estate cannot claim any part of the other half, under section 551 of the Probate Practice Act of Montana, providing that upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband: *Chadwick v. Tatem*, 9 Mont. 354.

The widow inherits one half of the common property if the husband dies leaving descendants: *Jewell v. Jewell*, 28 Cal. 232; *Scott v. Ward*, 13 Cal. 458; *Morrison v. Bowman*, 29 Cal. 337; *Payne v. Payne*, 18 Cal. 291.

And the other half goes to the descendants of the deceased husband; that is, to a particular class of his heirs: *Payne v. Payne*, 18 Cal. 291.

He can dispose of the latter half by will, but the former half not: *Payne v. Payne*, 18 Cal. 291; *In re Silvey*, 42 Cal. 210; *Morrison v. Bowman*, 29 Cal. 337.

The wife is entitled to her own share of the common property, and to the legacy out of the share of her husband: *Beard v. Knox*, 5 Cal. 252.

Real property conveyed to the wife during coverture for a valuable consideration is the community property of herself and husband, and upon his death she owns only an undivided half interest therein as tenant in common with the heirs to whom the other

half descends: *Hart v. Robertson*, 21 Cal. 346.

If there are no descendants of a deceased husband, the wife is entitled to the whole of the community property: *Cummings v. Cherier*, 10 Cal. 519.

Prior to April, 1864, if the husband died leaving a widow and descendants, the descendants inherited one half of the common property, and it was not subject to his testamentary disposition, but if he died leaving a widow and no descendants, one half of the common property was subject to his testamentary disposition: *Jewell v. Jewell*, 28 Cal. 232.

Upon the death of the husband leaving no descendants, the widow and father of the husband inherit each one half of the common property: *Jewell v. Jewell*, 28 Cal. 232.

The heirs of a divorced wife succeed to her interest in the community property upon her death, where the decree of divorce gave her one half thereof: *McLeran v. Benton*, 31 Cal. 29.

Woman living with a married man as his wife is not entitled to succeed to his property as a wife: *In re Winters*, Myr. Prob. 131.

If the widow accepts a devise under a will disposing of the entire community property, she confirms the will, and cannot claim one half of such property in her own right: *In re Stewart*, 74 Cal. 98.

A devise of all testator's property to his wife entitles her, where it is community property, to one half in her own right, and also one half under the devise: *Payne v. Payne*, 18 Cal. 291.

A devise of all testator's property is a devise of one half the community property only: *In re Delaney*, 49 Cal. 76.

A purpose by a husband to attempt the disposition by will of the wife's half of the common property is not to be readily inferred, and especially not where the words employed may have their fair and natural import by applying them to that moiety of which he has the testamentary disposition: *In re Silvey*, 42 Cal. 210.

Where a husband, having only common property, left a will devising all his estate to his wife for life,

and after her death to be equally divided between the children, it was held that she owned absolutely one half of the common property and was entitled to a life estate in the other half: *In re Silvey*, 42 Cal. 210.

If a testator by will devises his real estate to his wife, and the same is community property, and there is nothing on the face of the will to show that he intended to devise more than the undivided one half, which is subject to his testamentary disposition, and the executor, under a power of sale in the will, and in ignorance of the law which allows the wife to inherit one half of the community property, sells and conveys the right of the testator to all the land, and the purchaser, also in ignorance of the law, supposes he is buying the entire property, and the wife, also in ignorance of the law, receives the purchase-money, she does not thereby waive her rights to the common property. She is not required to elect whether she will take under the will or repudiate it. The essence of election or ratification is, that it was done with full knowledge of the party's rights: *King v. Lagrange*, 50 Cal. 328.

A widow, by acting as executrix, and by claiming and taking under a will of her husband, by which he gave her one half of all his property, and the

other half to the children of his brother, will not be deemed to have renounced her rights to the one half of the property in her own right, it all being community property: *In re Frey*, 52 Cal. 661.

A distribution of common property of a decedent should be made as follows: one half to the widow, and the other half to brothers and sisters of intestate: *Clark v. Clark*, 17 Nev. 124.

No conveyance to distributees is required from the administrator of the community property of deceased and his widow. Such property vests in the administrator for purposes of administration only: *Wright v. Smith*, 19 Nev. 143.

An order setting apart a homestead in the community property pending administration relieves it from administration and excludes it from distribution, but does not affect the title to the homestead; and if no homestead was declared during the existence of the community, the community property vests according to section 1402 of the California Civil Code (§ 481, *supra*), regulating succession thereto, subject, however, to its temporary use as a homestead under the order of the court setting it apart for that purpose: *In re Gilmore*, 81 Cal. 240.

§ 482. [1403.] Inheritance by Representation.—Inheritance or succession "by right of representation" takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents.

Idaho. — Same. Rev. Stats., sec. 5714.

Montana. — Same. Comp. Stats., p. 400, sec. 552.

Nevada. — Same. Gen. Stats., sec. 2991.

Oregon. — Same. Hill's Laws, sec. 3111.

Utah. — Same. Comp. Laws, sec. 2757.

Washington. — Same. Gen. Stats., sec. 1494.

§ 483. [1404.] Aliens may Inherit, when and how.—Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the pro-

visions of this title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession.

Arizona. — "In making title to land by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is or hath been an alien; and every alien to whom any land may be devised or may descend shall have five years to become a citizen of the territory and take possession of such land, or shall have five years to sell the same, before it shall be declared forfeited or shall escheat to the government; *provided*, that the treaties of the United States with the nation to which such alien may belong do not otherwise direct; and *provided further*, that aliens may take and hold any property, real or personal, in this territory, by devise or descent, from any alien or citizen in the same manner in which citizens of the United States may take and hold real or personal estate by devise or descent within the country of such alien." Rev. Stats., sec. 1472.

"If any person dies seized of any real estate or possessed of any personal estate without any devise thereof, and having no heirs, or while the owner of any real or personal estate shall be absent for the term of seven years, and is not known to exist, such estate shall escheat to and vest in the territory." Rev. Stats., sec. 1783.

Idaho. — Same as California. Rev. Stats., sec. 5715.

Montana. — Same as California. Comp. Stats., p. 400, sec. 553.

Nevada. — "Any non-resident alien, person, or corporation, except subjects of the Chinese empire, may take, hold, and enjoy any real property or any interest in lands, tenements, or hereditaments within the state of Nevada, as fully, freely, and upon the same terms and conditions, as any resident citizen, person, or domestic corporation." Gen. Stats., sec. 2655.

Oregon. — Same as California. Hill's Laws, sec. 2988.

Utah. — Same as California. Comp. Laws, sec. 2758.

Washington. — "Any alien, except such as by the laws of the United States are incapable of becoming citizens of the United States, may acquire and hold lands, or any right thereto or interest therein, by purchase, devise, or descent, and he may convey, mortgage, and devise the same, and if he shall die intestate, the same shall descend to his heirs; and in all cases such lands shall be held, conveyed, mortgaged, or devised, or shall descend in like manner and with like effect, as if such alien were a citizen of this state or of the United States." Gen. Stats., sec. 2955.

This section has been modified by article 2, section 33, constitution of Washington.

See §§ 360, 361, *ante*, and notes.

As to inheritable qualities of aliens, see Const. Cal., art. 9, sec. 17; *Farrell v. Enright*, 12 Cal. 450; *Siemens v. Bofer*, 6 Cal. 250; *Norris v. Hoyt*,

18 Cal. 217; *People v. Folsom*, 5 Cal. 373.

In this state, property left by a foreigner dying here must be dis-

tributed according to the law of this state: *In re Baubichon*, 49 Cal. 18.

The law permitting non-resident aliens to inherit real property is constitutional: *State v. Rogers*, 13 Cal. 159; *State v. Smith*, 70 Cal. 153.

Non-resident alien loses right to petition for revocation of probate of will when: *In re Broderick*, Myr. Prob. 19.

A proceeding brought by the attorney-general under the Code of Civil Procedure, title 8, part 3, to secure as an escheat to the school fund the property of an intestate who has no resident heirs, is premature when brought within five years after the death of such intestate: *People v. Roach*, 76 Cal. 294.

§ 484. [1405.] Succession not Claimed — Duty of Attorney-General. — When succession is not claimed as provided in the preceding section, the district court, on information, must direct the attorney-general to reduce the property to his or the possession of the state, or to cause the same to be sold, and the same, or the proceeds thereof, to be deposited in the state treasury for the benefit of such non-resident foreigner, or his legal representative, to be paid to him whenever, within five years after such deposit, proof to the satisfaction of the state controller and treasurer is produced that he is entitled to succeed thereto.

NOTE. — In 1880 the legislature failed to amend this section, as it did others, by substituting the word "superior" for "district."

See *People v. Roach*, 76 Cal. 294.

Idaho. — Same. Rev. Stats., sec. 5716.

Montana. — Same, with these exceptions, to wit: "District attorney of the district in which the property is situated" instead of "attorney-general," "territory" instead of "state," "territorial treasury" instead of "state treasury," and "territorial auditor and treasurer" instead of "state controller and treasurer." Comp. Stats., p. 400, sec. 554.

Utah. — "When succession is not claimed as provided in the preceding section, the probate court must proceed as provided in chapter 11 of the "act relating to procedure of probate courts in the settlement of estates." Comp. Laws, sec. 2759.

§ 485. [1406.] When the Property and Estate Escheat to the State. — When so claimed, the evidence and the joint order of the controller and treasurer must be filed by the treasurer as his voucher, and the property delivered or the proceeds paid to the claimant on filing his receipt therefor. If no one succeeds to the estate or the proceeds, as herein provided, the property of the decedent devolves and escheats to the people of the state, and is placed by the state treasurer to the credit of the school fund.

See *People v. Roach*, 66 Cal. 294.

"Whenever any person has received moneys, or has money or other personal property which belongs to the state by escheatment or otherwise, or has been intrusted with the collection, management, or disbursement of any moneys, bonds, or interest accruing therefrom, belonging to or held in trust by the state, and fails to render an account thereof to, and make settlement with, the controller within the time prescribed by law, or, when no particular time is specified, fails to render such account and make settlement, or who fails to pay into the state treasury any moneys belonging to the state, upon being required so to do by the controller within twenty days after such requisition, the controller must state an account with such person, charging twenty-five per cent damages, and interest at the rate of ten per cent per annum from the time of failure; a copy of which account in any suit therein is *prima facie* evidence of the things therein stated. But in case the controller cannot, for want of information, state an account, he may, in any action brought by him, aver that fact, and allege generally the amount of money or other property which is due to or which belongs to the state." Cal. Pol. Code, sec. 437.

Arizona. — See Rev. Stats., sec. 1783, under § 131, *ante*.

"The court shall examine the claim and the allegations and proof, and if it shall find that such person is an heir, devisee, legatee, or legal representative, whether citizen or foreigner, such court shall make an order directing the territorial auditor to issue his warrant on the treasury for the payment of the same, but without interest or costs, a copy of which order, under the seal of the court, shall be a sufficient voucher for issuing such warrant, and the same proceedings shall be instituted for the recovery of any money or property heretofore deposited with the treasurer, in accordance with the laws heretofore existing." Rev. Stats., sec. 1797.

"The proceeds of all property escheated in accordance with the provisions of this act shall be paid to the treasurer of the territory, and become part of the territorial school fund." Rev. Stats., sec. 1798.

Idaho. — Same. Rev. Stats., sec. 5717.

Montana. — Same. Comp. Stats., p. 400, sec. 555.

Nevada. — "If any person shall die, or any person who may have died within the limits of what is now the territory of Nevada, seised of any real or personal estate, and leaving no heirs, representatives, or devisees capable of inheriting or holding the same, and in all cases when there is no owner of such real estate capable of holding the same, such estate shall escheat to and be vested in this territory." Gen. Stats., sec. 2992.

Oregon. — "When any person shall die without heirs, leaving any real or personal property in this state, the same shall escheat to and become the property of this state." Hill's Laws, sec. 3135.

Lands escheat to the state under section 3302 of the Washington code, and the title vests immediately in the state on the death of the owner, without the aid or intervention of the probate court, where the owner dies intestate, leaving no husband or wife or kindred: *Territory v. Klee*, 1 Wash. 183.

The constitution does not in terms vest the title to escheated estates in the school fund; it enjoins their application to and prohibits their diversion from such fund, but the legislature may determine what estates shall escheat: *In re Sticknoth*, 7 Nev. 223.

§ 486. [1407.] Property Escheated Subject to Charges as Other Property.—Real property passing to the state under the last section, whether held by the state or its officers, is subject to the same charges and trusts to which it would have been subject if it had passed by succession, and is also subject to all the provisions of Title VIII., Part III., of the Code of Civil Procedure.

Montana.—Same. Comp. Stats., p. 400, sec. 556.

§ 487. [1408.] Successor Liable for Decedent's Obligations.—Those who succeed to the property of a decedent are liable for his obligations in the cases and to the extent prescribed by the Code of Civil Procedure.

Montana.—Same. Comp. Stats., p. 400, sec. 557.

Oregon.—“Whereas the chapter regulating the descent of real property and the distribution of personal property of deceased persons was repealed, by inadvertence, at the last session of the legislative assembly, the rule of distribution of personal property herein established and provided is hereby declared to have been the law of this state since the repeal of such act; *provided*, that nothing in this section shall be so construed as to disturb the settlement of any estate whereof administration is complete and distribution made.” Hill's Laws, sec. 3112.

ARTICLE II.

OF ESCHEATED ESTATES.

§ 488. Manner of commencing proceedings.

§ 489. Receiver of rents and profits may be appointed.

§ 490. Appearance, pleadings, and trial.

§ 491. Proceedings by persons claiming escheated estates.

§ 488. [1269.] Manner of Commencing Proceedings.—When the attorney-general is informed that any real estate has escheated to this state, he must file an information in behalf of this state, in the superior court of the county in which such estate, or any part thereof, is situated, setting forth a description of the estate, the name of the person last seised, the name of the occupant and person claiming such estate, if known, and the facts and circumstances in consequence of which the estate is claimed to have been escheated, with an allegation that, by reason thereof, the state of California has right by law to such estate. Upon such information a summons must issue to such

person, requiring him to appear and answer the information within the time allowed by law in civil actions; and the court must make an order setting forth briefly the contents of the information, and requiring all persons interested in the estate to appear and show cause, if any they have, within forty days from the date of the order, why the same should not vest in this state; which order must be published for at least one month from the date thereof, in a newspaper published in the county, if one be published therein, and in case no newspaper is published in the county, in some other newspaper in this state.

"It shall be the duty of the attorney-general to institute investigation for the discovery of all real and personal property which may have or should escheat to the state, and for that purpose shall have full power and authority to cite any and all persons before any of the superior courts of this state, to answer investigations and render accounts concerning said property, real or personal, and to examine all books and papers of any and all corporations. When any real or personal property shall be discovered, which should escheat to the state, the attorney-general must institute suit in the superior court of the county where said property shall be situated, for the recovery, to escheat the same to the state. The proceedings in all such actions shall be those provided for in title 8, part 3, Code of Civil Procedure. The attorney-general may, for the purposes and objects of this section, employ counsel to act in his place and stead for the discovery and recovery of both personal and real property; and in such proceedings, both in investigation for discovery or proceedings for recovery, such counsel so employed shall have the power and authority of the attorney-general. The compensation for services of such counsel shall be determined by the board of examiners, and paid out of the sums so found to be escheated and recovered to the state, and not otherwise; *provided*, that the state of California shall in no case be responsible for any charges for attorney fees for suits prosecuted under this act, but the attorney-general is hereby authorized to pay to the person or persons discovering the same the costs and charges of prosecuting any suit or suits under this act, a sum not in any case exceeding ten per cent of the sums actually received as provided in this act." Cal. Pol. Code, sec. 474.

For title 8, etc., see §§ 488-491.

Arizona. — "When the district attorney of any county shall be informed or has reason to believe that an executor under the will of any person who has died without heirs, and without having devised his estate, has not accepted the trust, and that no administrator with the will annexed has been appointed, or where said attorney shall discover that no letters of administration on the estate of an intestate, who has died without heirs, have been granted, he shall file a complaint in behalf of the territory, in the district court of the county where such succession is required to be opened, according to the law regulating the place of opening successions, which complaint shall set forth a descrip-

tion of the estate, the name of the person last lawfully seised or possessed of the same, the names of the tenants or persons in actual possession, if any, and the names of the persons claiming the estate, if any such are known to claim the same, and the facts and circumstances in consequence of which such estate is claimed to have escheated, praying for a writ of possession for the same in behalf of the territory." Rev. Stats., sec. 1784.

"Such court shall award and issue a *scire facias* against such persons as shall be alleged in such complaint to hold possession or claim such estate, requiring them to appear and show cause why such estate shall not be vested in the territory at the next term of the court." Rev. Stats., sec. 1785.

"Such *scire facias* shall be served ten days before the day of trial, and the court shall make an order setting forth briefly contents of such complaint, and requiring all persons interested in the estate to appear and show cause why the same should not be vested in the territory, which order shall be published as required by section 64 of the Code of Procedure in civil suits." Rev. Stats., sec. 1786.

"If it appear that the territory has no title in such estate, the defendant shall recover his costs, to be taxed and certified by the clerk, and the territorial auditor shall, on such certificates being filed in his office, issue a warrant therefor on the treasurer, which shall be paid as other demands on the treasury are paid." Rev. Stats., sec. 1791.

"Any party who shall have appeared to any such proceedings, and the district attorney on behalf of the territory, shall have the right to prosecute an appeal or writ of error upon such judgment." Rev. Stats., sec. 1794.

"The treasurer shall keep just accounts of all moneys paid into the treasury, and of all lands vested in the territory under the provisions of this act." Rev. Stats., sec. 1795.

"Any decree of the probate court finally closing any estate may be revised and corrected in the district court of the county in which the letters were granted to such executor or administrator, upon the ground that there was error, fraud, or mistake of law or fact in such final account and settlement, upon the application of the territory, by bill of review, in the same manner as is now provided by law for the revision and correction of any such account and settlement by any individual interested in an estate." Rev. Stats., sec. 1799.

"In any case in which the governor has reason to believe that there has been fraud, error, or mistake of law or fact in any such final account and settlement, he is authorized to retain counsel and have proceedings instituted, in accordance with the provisions of this act and the laws, to have such final account and settlement revised and corrected for the protection of the rights of the territory, and for such services the counsel so retained shall be allowed a reasonable compensation." Rev. Stats., sec. 1800.

"All suits brought for the collection of the assets turned over to the treasurer under this act shall be brought in the name of the territory of Arizona." Rev. Stats., sec. 1801.

Section 1802 of the Revised Statutes repeals chapter 71, Compiled Laws of Arizona, and all acts and parts of acts amendatory and supplementary thereto,

and provides that this act shall not affect suits pending when this act took effect.

Nevada. — "That whenever the attorney-general shall be informed, or shall have reason to believe, that any real estate hath escheated to this territory by reason that any person hath died seised thereof, and hath left no heirs capable of inheriting the same, or by reason of the incapacity of the devisees to hold the same, or when he shall be informed, or have reason to believe, that any such estate hath otherwise escheated to the territory, it shall be his duty to file an information in behalf of the territory in the district court of the judicial district in which such estate, or any part thereof, is situated, setting forth a description of the estate, the name of the person last lawfully seised, the name of the terre-tenant and persons claiming such estate, if known, and the facts and circumstances in consequence of which said estate is claimed to have escheated, and alleging that by reason thereof the territory of Nevada hath right by law to such estate; whereupon such court shall award and issue a summons against such person or persons, bodies politic or corporate, alleged in such information to hold, possess, or claim such estate, requiring them to appear and show cause why such estate should not be vested in the territory, within the time allowed by law in other civil cases, and the court shall make an order setting forth briefly the contents of said information, and requiring all persons interested in the estate to appear and show cause, if any they have, within thirty days from the date of said order, why the same should not vest in this territory, which order shall be published at least one month from the date thereof in a newspaper published in said district (if one be published therein), and in case no newspaper should be published in said district, by direction of the judge, in some other newspaper in this territory." Gen. Stats., sec. 2993.

"Any person furnishing original information to the attorney-general of the escheating of any property to the territory, together with the necessary evidence to sustain the action of the territory in such behalf, shall be entitled to receive, upon the final recovery of such property, five per centum of the property so recovered; *provided*, that the amount so received by the person or persons furnishing such information shall not, in the aggregate, exceed the sum of twenty thousand dollars in any one case; *and provided*, that only one person shall be entitled to compensation for such services." Gen. Stats., sec. 2998.

Oregon. — "The state may maintain any action, suit, or proceeding necessary to recover the possession of any such property, or for the enforcement or protection of its rights thereto, or on account thereof, in like manner and with like effect as any natural person. Such actions, suit, or proceeding shall be prosecuted by the proper district attorney by the leave and under the direction of the governor, and not otherwise." Hill's Laws, sec. 3136.

"When the governor is informed, or has reason to believe, that any real or personal property has escheated to this state, he shall direct the district attorney of the judicial district in which such property may be to file an information in behalf of the state of Oregon, and in the name of the state, in the circuit court of the county in which such estate or any part thereof is situated, setting forth a description of the estate, the name of the person last seised, the

name of the occupant or the person in possession and claiming such estate, if known, and the facts and circumstances in consequence of which the estate is claimed to have been escheated, with an allegation that by reason thereof the state of Oregon has right by law to such estate. Upon such information, a summons must issue to such person, requiring heirs to appear and answer the information within the time allowed by law in civil actions, and the court must make an order setting forth briefly the contents of the information, and requiring all persons interested in the estate to appear and show cause, if any they have, within such time as the court making such order may fix, why the title should not vest in this state, which order must be published for at least six consecutive weeks from the date thereof in a newspaper published in the county, if one be published therein, and in case no newspaper is published in the county, then in such newspaper as the court by order may direct." Hill's Laws, sec. 3137.

"When the governor is informed, or has reason to believe, that any bank, banker, or banking institution in this state now has or holds on deposit or otherwise, any fund, funds, or other property of any kind or nature which has escheated to this state, he shall direct the district attorney in the district where such bank or banking institution is located to file in the circuit court an information or bill of discovery, with proper interrogatories to be answered by the owner, agent, or manager of such bank or banking institution, and upon the filing of such information or bill, the court shall order and direct, at a time to be designated in said bill, that said owner, agent, or manager of such bank or banking institution shall, under oath, file an answer to said information and interrogatories, and shall specially answer each and every interrogatory contained in such information or bill. If it appears to the court from such answer that said bank, banker, or banking institution has any property in its possession which has or may escheat to this state, it shall direct the said bank, banker, or banking institution forthwith to bring the same into such court, and the court shall proceed to dispose of said property as provided elsewhere in this act." Hill's Laws, sec. 3143.

See § 361, *ante*; Cal. Const., art. 1, sec. 17; *People v. Rodgers*, 13 Cal. 165, 489.

The possession of an estate said to have escheated cannot be taken until that fact is judicially ascertained: *People v. Folsom*, 5 Cal. 373; *Ramirez v. Kent*, 2 Cal. 558; *Norris v. Hoyt*, 18 Cal. 217.

An alien cannot be deprived of his lands or of any right incident to its ownership by proof of his alienage in a collateral proceeding: *Ramirez v. Kent*, 2 Cal. 558.

A proceeding brought by the attorney-general under the California Code of Civil Procedure to secure, as an escheat to the school fund, the

property of an intestate who has no resident heirs, is premature, when brought within five years after the death of such intestate: *People v. Roach*, 76 Cal. 294.

A receiver appointed to take charge of an escheated estate is entitled to the custody of the realty only, and its rents and profits. The administrator of such an estate is the proper custodian of the personality, and the district court has no authority to compel him to deliver it to such receiver: *Territory v. Forrest*, 1 Ariz. 49.

Form No. 241.—Information by Attorney-General in Escheat Proceedings.

[Title of Court.]

The State of —, Plaintiff, .
v.
John Smith, Mary Smith, and
John Skelton, Defendants. }

The attorney-general of the state of — files this information on behalf of said state, and alleges:—

That James Smith died intestate on or about the — day of A. D. 18—, in the county of —, state of —; that at the time of his death he was seised in fee of the following described real property, to wit (here insert description);

That he left no heirs surviving him, nor did he devise his property by will,¹ and that by reason thereof the state of — has right by law to said estate;

That the defendants, John Smith, Mary Smith, and John Skelton, are in the possession of said real property, and claim an interest therein adverse to said state and against law;—

Wherefore plaintiff demands judgment of this court declaring that said estate has escheated, and that the state of — be seised thereof, and recover costs of suit against the defendants; and that the court make an order directing the sheriff of the county where said real property is situate to sell said property at public sale for gold coin, after giving such notice of the time and place of sale as may be prescribed by the court in said order, and further directing that said sheriff make due return of his proceedings to this court. —, Attorney-General.

Form No. 242.—Summons in Escheat Proceedings.

(The form of this summons is the same as in ordinary civil actions.)

Form No. 243.—Order to Show Cause in Escheat Proceedings.

[Title of Court and Cause.]

An information having been this day filed by the attorney-

¹ The estate escheats, also, in the case of a decedent leaving surviving heirs who are non-resident foreigners, and who fail to appear and claim such succession within five years after the death of the decedent: See § 483, *ante*.

general of the state of ——— praying that certain real property be declared escheated, —

It is ordered that all persons interested in the estate of ———, deceased, appear within forty days from the date hereof, and show cause, if any they can, why the property hereinafter described should not vest in the state of ———.

In said petition it is alleged that James Smith died intestate on or about the ——— day of ———, A. D. 18—, in the county of ———, state of ———, and that at the time of his death he was seised in fee of the following described real property, to wit (here insert description); that he left no heirs surviving him, nor did he devise his property by will; and that by reason thereof the state of ——— has right by law to said estate.

Dated ———, 18—. ———, Judge of the ——— Court.

§ 489. [1270.] Receiver of Rents and Profits may be Appointed. — The court, upon the information being filed and upon the application of the attorney-general, either before or after answer, upon notice to the party claiming such estate, if known, may, upon sufficient cause therefor being shown, appoint a receiver to take charge and receive the rents and profits of the same until the title to such real estate is finally settled.

Nevada. — Same, with a few verbal variations which do not change the import of the section. Gen. Stats., sec. 2997.

Oregon. — Same. Hill's Laws, sec. 3138.

Receiver: See Cal. Code Civ. Proc., secs. 564-569.

§ 490. [1271.] Appearance, Pleadings, and Trial. — All persons named in the information may appear and answer, and may traverse or deny the facts stated in the information, the title of the state to lands and tenements therein mentioned, at any time before the time for answering expires; and any other person claiming an interest in such estate may appear and be made a defendant, and by motion for that purpose in open court, within the time allowed for answering; and if no person appears and answers within the time, then judgment must be rendered that the state be seised of the lands and tenements in such information claimed. But if any person appear and deny the title set up by the state, or

traverse any material fact set forth in the information, the issue of fact must be tried as issues of facts are tried in civil actions. If, after the issues are tried, it appears from the facts found or admitted that the state has good title to the land and tenements in the information mentioned, or any part thereof, judgment must be rendered that the state be seised thereof, and recover costs of suit against the defendants. In any judgment rendered, or that has heretofore been rendered, by any court of competent jurisdiction, escheating real property to the state, on motion of the attorney-general, the court shall make an order that said real property be sold by the sheriff of the county where the same is situate, at public sale, for gold coin, after giving such notice of the time and place of sale as may be prescribed by the court in the said order; that the sheriff shall, within five days after such sale, make a report thereof to the court, and upon the hearing said report, the court may examine the said report, and witnesses in relation to the same; and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent, exclusive of the expense of a new sale, may be obtained, the court may vacate the sale, and direct another sale to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of ten per cent more in amount than that named in the report be made to the court, in writing, by a responsible person, the court may, in its discretion, accept such offer, and confirm the sale to such person, or order a new sale. If it appears to the court that the sale was legally made, and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, and that a greater sum than ten per cent, exclusive of the expense of a new sale, cannot be obtained, or if the increased bid above mentioned be made and accepted by the court, the court must make an order confirming the sale, and directing the sheriff, in the name of the state, to execute to purchaser or purchasers a conveyance of said property sold; and said conveyance shall vest in the purchaser or purchasers all the right and title of the state therein, and the sheriff shall out of the proceeds of such sale pay the cost of said proceedings incurred on behalf

of the state, including the expenses of making such sale, and also an attorney's fee, if additional counsel was employed in said proceedings, to be fixed by the court, not exceeding ten per cent on the amount of such sale, and the residue thereof shall be paid by such sheriff into the state treasury.

Arizona. — "All persons named in such complaint as tenants or persons in actual possession, or claimants of the estate, may appear and plead to such proceedings, and may traverse the facts stated in the complaint, or the title of the territory to the lands and tenements therein mentioned, as in civil cases, and any other person claiming an interest in such estate may appear and be made a defendant and plead as in other cases." Rev. Stats., sec. 1787.

"If no person, after notice as aforesaid, shall appear and plead within the time prescribed by law, then judgment shall be rendered by default in behalf of the territory." Rev. Stats., sec. 1788.

"If any person appear and deny title set up by the territory, or traverse any material fact in the complaint, issue shall be made up and tried as other issues of fact; and a survey may be ordered, as in other cases where titles or boundaries of land are drawn in question." Rev. Stats., sec. 1789.

"If, after the issue and trial, it appears from facts found or admitted that the territory has good title to the estate, real or personal, in the complaint mentioned, or any part thereof, judgment shall be rendered that the territory shall be seised or possessed thereof, and, at the discretion of the court, recover costs against the defendants." Rev. Stats., sec. 1790.

"When any judgment shall be rendered that the territory be seised or possessed of any estate, such judgment shall contain a description thereof, and shall vest the title in the territory." Rev. Stats., sec. 1792.

"A writ shall be issued to the sheriff or any constable of the proper county, commanding him to seize such estate vested in the territory; and if the same be personal property or real estate, he shall dispose thereof at public auction in the manner provided by law for the sale of property under execution, and the proceeds paid into the treasury of the territory." Rev. Stats., sec. 1793.

Nevada. — "All persons, bodies politic and corporate, named in such information as terre-tenant, or claimant to the estate, may appear and plead to such proceedings, and may traverse or deny the facts stated in the information, the title of the territory to lands and tenements therein mentioned, at any time on or before the third day of the return day of the summons; and any other person claiming an interest in such estate may appear and be made a defendant, and plead as aforesaid, by motion for that purpose in open court, within the time allowed for pleading as aforesaid; and if any person shall appear and plead as aforesaid, or shall refuse to plead within the time, then judgment shall be rendered that the territory be seised of the lands and tenements in such information claimed. But if any person shall appear and deny the title set up by the territory, or traverse any material fact set forth in the information, or issue or issues shall be made up and tried as other issues of fact, and a survey may be ordered and entered as in other actions when the title or boundary is drawn in question; and if, after the issues are tried, it

shall appear from the facts found or admitted that the territory hath good title to the land and tenements in the information mentioned, or any part thereof, judgment shall be rendered that the territory be seised thereof, and recover costs of suit against the defendants." Gen. Stats., sec. 2994.

Oregon. — "All persons named in the information may appear and answer, and may traverse or deny the facts stated in the information, the title of the state to lands and tenements therein mentioned, at any time before the time for answering expires; and any other person claiming an interest in such estate may appear and be made a defendant by motion for that purpose in open court, within the time allowed for answering; and if no person appears and answers within the time, then judgment must be rendered that the state be seised of the lands and tenements in such information claimed. But if any person appears and denies the title set up by the state, or traverse any material fact set forth in the information, the issue of the fact must be tried as issues of facts are tried in civil actions. If, after the issues are tried, it appears from the facts found or admitted that the state has good title to the estate in the information mentioned, or any part thereof, judgment must be rendered that the state be seised thereof, and recover costs of suit against the defendant. In any judgment rendered, or that has heretofore been rendered, by any court of competent jurisdiction, escheating real property to the state, on motion of the district attorney, the court shall make an order that said real property be sold by the sheriff of the proper county where the same is situated, at public sale, and upon such terms, whether for cash or credit, or both, as shall be deemed for the best interests of the state. And if such court shall deem it most advantageous for the state, it may direct that said lands be surveyed into lots and sold in specific positions upon such terms as to payments therefor as may be deemed best for the state. After giving such notice of the time and place of sale as may be prescribed by the court in said order, the sheriff shall, within ten days after such sale, make a report thereof to the court, and upon hearing said report, the court may examine the same, and witnesses in relation thereto, and if the proceedings of such sale are unfair, or the sum or sums bid are disproportionate to the value of the portion sold, and if it appear that a greater sum can be obtained for said property, or any portion thereof, exceeding such bid at least ten per cent, exclusive of the expense of a new sale, the court may vacate the sale and direct another sale to be had, and the new sale shall be conducted in all respects as if no previous sale had taken place. But if it appears to the court that the sale was legally made and finally [fairly] conducted, and that the sum bid is not disproportionate to the value of the property sold, and that a greater sum than ten per cent, exclusive of the expense of a new sale, cannot be obtained, the court must make an order confirming the sale and directing the sheriff, in the name of the state, to execute to purchaser or purchasers a conveyance of said property sold; and said conveyance shall vest in the purchaser or purchasers all the right and title of the state therein; and also directing that the purchaser or purchasers shall execute and deliver to said sheriff his or their note or notes, payable to the board of commissioners for the sale of school and university lands, and for the investment of funds arising therefrom for the deferred payments, with a mortgage

deed to said board upon the property conveyed, to secure said deferred payments. And the sheriff shall, out of the proceeds of such sale, pay the cost of said proceedings incurred on behalf of the state, including the expense of making such sale, and the remainder, together with said notes and mortgages, he shall deliver to the district attorney, taking his receipt therefor, which said receipt shall be returned by him to the court." Hill's Laws, sec. 3139.

"The court before whom such proceedings shall be conducted shall allow to the district attorney a reasonable attorney's fee for conducting such proceedings on behalf of the state, not exceeding ten per cent on the amount of such sales, and the residue shall be paid and turned over by such district attorney to the state treasurer of this state." Hill's Laws, sec. 3140.

"In all cases of personal estate, the court shall direct by order that the same be sold by the sheriff as upon execution, and the proceeds be applied to the payment of the costs incurred by the state, and the costs and charges of making such sale, and the residue to the district attorney, who shall deduct therefrom his attorney fees, to be fixed by the court, and the balance he shall turn into the state treasury of this state." Hill's Laws, sec. 3142.

"Whenever it shall appear to the governor necessary to employ additional counsel to aid the district attorney in the prosecution of any action, suit, or proceeding authorized by the provisions of this act, such counsel shall be paid such sum or sums for his, her, or their services as the court before whom such action, suit, or proceeding is had shall deem reasonable, which compensation shall be paid out of the proceeds arising from such proceeding. And the governor is hereby authorized and empowered to employ additional counsel in all cases in which he deems it for the best interest of the state." Hill's Laws, sec. 3144.

If the non-resident heir shall fail to appear and claim it within a year, the money should be paid into the state treasury, where it must remain until claimed by the owner or, in case of his death, by his representatives: *Pyatt v. Brockman*, 6 Cal. 418.

Form No. 244.—Judgment in Escheat Proceedings.

[Title of Court and Cause.]

Now, on this — day of —, A. D. 18—, this cause coming on regularly for hearing upon the information of the attorney-general on behalf of the state of —, and no person having appeared or answered herein within the time allowed by law, and it appearing that James Smith died intestate in this state on or about the day of —, A. D. 18—, and that at the time of his death he was seised in fee of the following described real property (here insert description); that he left no heirs surviving him, nor did he devise his property by will;—

It is therefore ordered, adjudged, and decreed that by reason of said facts the state of — has right by law to said real property, and it is further adjudged that said state be seised

thereof, and the sheriff of the — county of —, in said state that being the county in which said real property is situate, be and he is hereby directed to sell said real property at public auction, for gold coin, and that he give such notice of the time and place of said sale as is required by law to be given of sales under execution, and make due return of his proceedings to this court. —, Judge of the — Court.

Dated—, 18—.

NOTE. — A certified copy of the above decree is the sheriff's authority to sell.

Form No. 245.—Report of Sale by Sheriff in Escheat Proceedings.

(This form is the same as return of sale by sheriff under a judgment foreclosing a mortgage.)

Form No. 246.—Order Confirming Sale by Sheriff in Escheat Proceedings.

(For form of this, see order confirming sale of real estate by administrator.)

§ 491. [1272.] **Proceedings by Persons Claiming Escheated Estates.**—Within twenty years after judgment in any proceeding had under this title, a person not a party or privy to such proceeding may file a petition in the superior court of the county of Sacramento, showing his claim or right to the property, or the proceeds thereof. A copy of such petition must be served on the attorney-general at least twenty days before the hearing of the petition, who must answer the same; and the court thereupon must try the issue as issues are tried in civil actions, and if it be determined that such person is entitled to the property, or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or if it has been sold and the proceeds paid into the state treasury, then it must order the controller to draw his warrant on the treasury for the payment of the same, but without interest or cost to the state, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant. All persons who fail to appear and file their petitions within

the time limited are forever barred, saving, however, to infants, married women, and persons of unsound minds, or persons beyond the limits of the United States, the right to appear and file their petitions at any time within the time limited, or five years after their respective disabilities cease.

Arizona. — "If any person appear after the death of the testator or intestate, and claim any money paid into the treasury under this act, as heir, or devisee, or legatee thereof, he may file a complaint in the district court for the county where the estate was sold, stating the nature of his claim, and praying that such money be paid to him, a copy of which complaint shall be served on the district attorney as in other civil cases, who shall put in an answer to the same." Rev. Stats., sec. 1796.

"The court shall examine the claim and the allegations and proof, and if it shall find that such person is an heir, devisee, legatee, or legal representative, whether citizen or foreigner, such court shall make an order directing the territorial auditor to issue his warrant on the treasury for the payment of the same, but without interest or costs, a copy of which order, the under seal of the court, shall be a sufficient voucher for issuing such warrant, and the same proceedings shall be instituted for the recovery of any money or property heretofore deposited with the treasurer, in accordance with the laws heretofore existing." Rev. Stats., sec. 1797.

Nevada. — "The auditor of the territory shall keep just and true accounts of all moneys paid into the treasury, all lands vested in the territory as aforesaid; and if any person shall appear within ten years after the death of the intestate, and claim any moneys paid into the treasury, as aforesaid, as heir or legal representative, such person may present a petition to the district court at the seat of government, stating the nature of his claim, and praying such money may be paid him; a copy of such petition shall be served on the attorney-general at least twenty days before the hearing of said petition, who shall put in answer to the same, and the court thereupon shall examine said claim, and the allegations and proofs; and if the court shall find that such person is entitled to any money paid into the territorial treasury, he shall, by an order, direct the territorial auditor to issue his warrant on the treasury for the payment of the same, but without interest or cost to the territory; a copy of which order under the seal of the court shall be a sufficient voucher for issuing such warrant; and if any person shall appear and claim land vested in the territory, as aforesaid, within five years after the judgment was rendered, it shall be lawful for such person (other than such as was served with a summons, or appeared to the proceeding, their heirs or assigns) to file in the said district court in which the lands claimed lie a petition setting forth the nature of his claim, and praying that the said lands may be relinquished to him; a copy of which petition shall be served on the attorney-general, who shall put in an answer, and the court thereupon shall examine said claim, allegations, and proofs, and if it shall appear that such person is entitled to such land claimed, the court shall decree accordingly, which shall be effectual for divesting the interest of the territory in or to the lands; but no costs shall be charged

to the territory; and all persons who shall fail to appear and file their petition within the time limited as aforesaid shall be forever barred; saving, however, infants, married women, and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petition, as aforesaid, at any time within five years after their respective disabilities are removed; *provided, however*, that the legislature may cause such lands to be sold at any time after seizure, in such manner as may be provided by law, in which case the claimants shall be entitled to the proceeds, in lieu of such lands, upon obtaining a decree or order, as aforesaid." Gen. Stats., sec. 2996.

Oregon. — Same as California, with the following verbal changes: For "superior court of the county of Sacramento," substitute "circuit court of the county where such information was filed"; for "attorney-general," substitute "district attorney"; for "controller," substitute "secretary of state"; for "five," substitute "one." Hill's Laws, sec. 3141.

CHAPTER XVIII.

GUARDIANSHIP OF INFANTS AND INSANE PERSONS.

- § 492. Guardian, what.
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- § 511. Guardian appointed by court, how superseded.
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§ 492. [236.] Guardian, What.—A guardian is a person appointed to take care of the person or property of another.

Montana.—Same. Comp. Stats., p. 376, sec. 409.

Utah.—Same. Comp. Laws, sec. 2536.

§ 493. [237.] Ward, What.—The person over whom or over whose property a guardian is appointed is called his ward.

Montana.—Same. Comp. Stats., p. 376, sec. 410.

Utah.—Same. Comp. Laws, sec. 2537.

§ 494. [238.] Kinds of Guardians.—Guardians are either,—1. General; or 2. Special.

Montana.—Same. Comp. Stats., p. 376, sec. 411.

Utah.—Same. Comp. Laws, sec. 2538.

See *Lord v. Howe*, 37 Cal. 660; Cal. Code Civ. Proc., secs. 372, 373.

One wrongfully intermeddling not acquire any of the rights of a guardian: *Aldrich v. Willis*, 55 Cal. 81.

§ 495. [239.] General Guardian, What. — A general guardian is a guardian of the person or of all the property of the ward within this state, or of both.

Arizona. — Same. Rev. Stats., sec. 1318.

Montana. — Same. Comp. Stats., p. 376, sec. 412.

Utah. — Same. Comp. Laws, sec. 2539.

§ 496. [240.] Special Guardian, What. — Every other is a special guardian.

Arizona. — Same. Rev. Stats., sec. 1319.

Montana. — Same. Comp. Stats., p. 376, sec. 413.

Utah. — Same. Comp. Laws, sec. 2540.

§ 497. [241.] Appointment by Parent. — A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing, — 1. If the child be legitimate, by the father, with the written consent of the mother; or by either parent, if the other be dead or incapable of consent; 2. If the child be illegitimate, by the mother.

Arizona. — Same. Rev. Stats., sec. 1320.

Idaho. — Same. Rev. Stats., sec. 5781.

Montana. — Same. Comp. Stats., p. 376, sec. 414.

Nevada. — The father may appoint guardian by will, and if he be dead, then the mother may appoint. No provision in reference to illegitimate child. Gen. Stats., sec. 558.

Oregon. — "Every father may, by his last will, in writing, appoint a guardian, or guardians, for any of his children, whether born at the time of making the will, or afterwards, to continue during the minority of the child, or for a less time, and every mother may, by her last will, in writing, appoint a guardian or guardians for any of her children, to continue during the minority of the child, or for a less time; *provided*, that the father of such child or children is dead and has not appointed a guardian, or whenever, by decree of divorce between such father and mother, the custody of such child or children has been awarded to the mother; and every such testamentary guardian shall have the same powers and perform the same duties with regard to the person and estate of the ward as a guardian appointed by the county court; *provided*, that nothing in this section shall be construed to deprive either the surviving father or mother of the custody of the person of his or her children, such surviving parent being competent to transact his or her own business." Hill's Laws, sec. 2885.

Utah. — "A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing; such appointment may be made by the father, with the written consent of the mother; or by either parent, if the other be dead or incapable of consent." Comp. Laws, sec. 2541.

Washington. — "The father of every legitimate child who is a minor, may, by his last will, in writing, appoint a guardian or guardians for his minor children, whether born at the time of making such will or afterwards, to continue during the minority of such child, or for any less time." Code Proc., sec. 1142.

See § 530, *post*.

Bond of: See § 541, *post*.

Testamentary guardian — Construction of statutes relating to: *Ingalls v. Campbell*, 18 Or. 461.

The common law did not recognize the right of either parent to appoint a testamentary guardian: *Ingalls v. Campbell*, 18 Or. 461.

Where a father has left his children, under fourteen years of age, to be supported and cared for by their grandmother, recognizing her rights to their custody, and at various times declared his intent never to reclaim

them, is not entitled to their custody and guardianship as against such grandmother. In such case the residence of the grandmother is the residence of the child, for the purpose of jurisdiction of the court in a matter of guardianship: *In re Vance*, 92 Cal. 195.

Testamentary Guardian. — For sketch of origin, see *Lord v. Howe*, 37 Cal. 657. Cannot act until he receives letters: *Aldrich v. Willis*, 55 Cal. 81; but see *Norris v. Harris*, 15 Cal. 226.

§ 498. [242.] No Person Guardian of Estate without Appointment. — No person, whether a parent or otherwise, has any power as guardian of property, except by appointment, as hereinafter provided.

"The parent, as such, has no control over the property of the child: Cal. Civ. Code, sec. 202.

Arizona. — Same. Rev. Stats., sec. 1321.

Montana. — Same. Comp. Stats., p. 376, sec. 415.

Utah. — Same. Comp. Laws, sec. 2543.

"That guardians may be appointed by the courts in this territory in the manner provided for in and pursuant to this act." Comp. Laws, sec. 2535.

See *Kendall v. Miller*, 9 Cal. 591; *McNeil v. First Cong. Soc.*, 66 Cal. 105.

Minors will not be permitted to adopt that part of an entire contract which is beneficial to themselves and reject the balance. Where a father purchases real property in the name of his minor child, and agrees that a mortgage for the purchase price

shall be given, and in pursuance of this agreement a mortgage is given in the name of the minor, the minors will be bound, although it is not shown that the father had authority to execute the mortgage, from any court: *Peers v. McLaughlin*, 88 Cal. 299.

§ 499. [243.] Appointment by Court. — A guardian of the person or property, or both, of a person residing in this state, who is a minor, or of unsound mind, may be appointed

in all cases other than those named in section two hundred and forty-one [§ 497, *ante*], by the superior court, as provided in the Code of Civil Procedure.

See §§ 501, 504, *post*.

Arizona. — Same. Rev. Stats., sec. 1322.

Montana. — Same. Comp. Stats., p. 376, sec. 416.

Utah. — Same. Comp. Laws, sec. 2542.

§ 500. [244.] **Same.** — A guardian of the property within this state of a person not residing therein, who is a minor, or of unsound mind, may be appointed by the superior court.

See §§ 572 et seq., *post*.

Arizona. — Same. Rev. Stats., sec. 1323.

Montana. — Same. Comp. Stats., p. 376, sec. 417.

Utah. — Same. Comp. Laws, sec. 2544.

§ 501. [245.] **Jurisdiction.** — In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him.

See *Swift v. Swift*, 40 Cal. 456.

Arizona. — Same. Rev. Stats., sec. 1324.

Montana. — Same. Comp. Stats., p. 376, sec. 418.

Utah. — Same, except that the word "first" is interpolated after the word "court." Comp. Laws, sec. 2545.

§ 502. [246.] **Rules for Awarding Custody of Minor.** — In awarding the custody of a minor, or in appointing a general guardian, the court or officer is to be guided by the following considerations:—

1. By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child be of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question;

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor and business, then to the father;

3. Of two persons equally entitled to the custody in other respects, preference is to be given as follows: 1. To a parent;

2. To one who was indicated by the wishes of a deceased parent; 3. To one who already stands in the position of a trustee of a fund to be applied to the child's support; 4. To a relative.

"The officers or managers of the orphan asylum having any such abandoned child in its care shall have the preferred right to the guardianship of such child, and upon application to the courts in the manner prescribed by law, shall be duly appointed such guardians, and shall have letters of guardianship." Cal. Stats. 1873-74, pp. 297, 298, sec. 4.

Abandoned Child, what is: See Cal. Civ. Code, sec. 197; also Cal. Stats. 1873-74, *supra*; and Adoption, *post*.

Arizona. — Same as California, section 246, *supra*, except that subdivision 2 is placed fourth. Rev. Stats., sec. 1325.

Montana. — Same as Arizona. Comp. Stats., p. 376, sec. 419.

Utah. — Same as California to subdivision 1, paragraph 3; then as follows: "1. To a parent; 2. To one who was indicated by the wishes of a deceased parent; 3. To one who already stands in the position of a trustee of a fund to be applied to the child's support; 4. To a relative." Comp. Laws, sec. 2546.

§ 503. [247.] Powers of Guardian Appointed by Court. — A guardian appointed by a court has power over the person and property of the ward, unless otherwise ordered.

Arizona. — Same. Rev. Stats., sec. 1326.

Montana. — Same. Comp. Stats., p. 377, sec. 420.

Utah. — Same. Comp. Laws, sec. 2547.

§ 504. [248.] Duties of Guardian of the Person. — A guardian of the person is charged with the custody of the ward, and must look to his support, health, and education. He may fix the residence of the ward at any place within the state, but not elsewhere, without permission of the court.

Arizona. — Same. Rev. Stats., sec. 1327.

Montana. — Same. Comp. Stats., p. 377, sec. 421.

Utah. — Same. Comp. Laws, sec. 2548.

§ 505. [249.] Duties of Guardian of Estate. — A guardian of the property must keep safely the property of his ward. He must not permit any unnecessary waste or destruction of the real property, nor make any sale of such property without the order of the superior court, but must, so far as it is in his power, maintain the same, with its buildings and appurtenances, out of the income or other property of the estate, and deliver it to the ward at the close of his guardianship in as good condition as he received it.

Arizona.—“A guardian of the property must keep safely the property of his ward. He must not permit any unnecessary waste or destruction of the real property, nor make any sale of such property without the order of the probate court, but must, so far as it is in the power, maintain the same, with its buildings and appurtenances, out of the income or other property of the estate, and deliver it to the ward, at the close of his guardianship, in as good condition as he received it.” Rev. Stats., sec. 1328.

Montana.—Same as Arizona. Comp. Stats., p. 377, sec. 422.

Utah.—Same as California. Comp. Laws, sec. 2549.

Sale of Ward's Estate: See § 556, *post*.

Duties of Guardians: See § 549, *post*.

§ 506. [250.] **Relation Confidential.**—The relation of guardian and ward is confidential, and is subject to the provisions of the title on trust.

Arizona.—Same. Rev. Stats., sec. 1329.

Montana.—Same. Comp. Stats., p. 377, sec. 423.

Utah.—Same. Comp. Laws, sec. 2550.

Trusts: Cal. Civ. Code, secs. 2215 et seq.

§ 507. [251.] **Guardian under Direction of Court.**—In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the court.

Arizona.—Same. Rev. Stats., sec. 1330.

Montana.—Same. Comp. Stats., p. 377, sec. 424.

Utah.—Same. Comp. Laws, sec. 2551.

§ 508. [252.] **Death of a Joint Guardian.**—On the death of one of two or more joint guardians, the power continues to the survivor until a further appointment is made by the court.

Arizona.—Same. Rev. Stats., sec. 1331.

Montana.—Same. Comp. Stats., p. 377, sec. 425.

Utah.—Same. Comp. Laws, sec. 2552.

§ 509. [253.] **Removal of Guardian.**—A guardian may be removed by the superior court for any of the following causes:—

1. For abuse of his trust;
2. For continued failure to perform its duties;
3. For incapacity to perform its duties;
4. For gross immorality;

5. For having an interest adverse to the faithful performance of his duties;

6. For removal from the state;

7. In the case of a guardian of the property, for insolvency;
or

8. When it is no longer proper that the ward should be under guardianship.

Arizona. — Same. Rev. Stats., sec. 1332.

Montana. — Same. Comp. Stats., p. 377, sec. 426.

Utah. — Same. Comp. Laws, sec. 2553.

See § 331, *ante*.

Removal of Guardian: See § 580, *post*. This may be done at chambers, Cal. Code Civ. Proc., sec. 166; *Warder v. Elkins*, 38 Cal. 439.

A father who receives, as guardian of his minor children, an annual income of two thousand dollars, but who refuses to provide for their support and education, should be removed: *In re Swift*, 47 Cal. 629.

account after removing him: *Graff v. Mesmer*, 52 Cal. 636.

Presumptions are in favor of the regularity of the proceedings of court in removing guardian: *Brodribb v. Tibbitts*, 63 Cal. 80.

Court may settle guardian's

§ 510. [254.] Guardian Appointed by Parent, how Superseded.—The power of a guardian appointed by a parent is superseded,—

1. By his removal, as provided by section two hundred and fifty-three;

2. By the solemnized marriage of the ward; or

3. By the ward's attaining majority.

Arizona. — Same. Rev. Stats., sec. 1333.

Montana. — Same. Comp. Stats., p. 378, sec. 427.

Utah. — Same. Comp. Laws, sec. 2554.

Marriage of Ward: See § 552, *post*.

§ 511. [255.] Guardian Appointed by Court, how Suspended.—The power of a guardian appointed by a court is suspended only,—

1. By order of the court; or

2. If the appointment was made solely because of the ward's minority, by his attaining majority; or

3. The guardianship over the person of the ward, by the marriage of the ward.

Arizona. — Same, except the third subdivision is omitted. Rev. Stats., sec. 1334.

Montana. — Same as California. Comp. Stats., p. 378, sec. 428.

Utah. — Same as California. Comp. Laws, sec. 2555.

Marriage of Ward: See § 581, *post*.

§ 512. [256.] **Release by Ward.**—After a ward has come to his majority, he may settle accounts with his guardian, and give him a release, which is valid if obtained fairly and without undue influence.

Montana. — Same. Comp. Stats., p. 378, sec. 429.

Utah. — Same. Comp. Laws, sec. 2556.

§ 513. [257.] **Guardian's Discharge.**—A guardian appointed by a court is not entitled to his discharge until one year after the ward's majority.

Resignation: See § 551, *post*.

Montana. — Same. Comp. Stats., p. 378, sec. 430.

Utah. — Same. Comp. Laws, sec. 2557.

§ 514. [258.] **Insane Persons, how Committed, etc.**—A person of unsound mind may be placed in an asylum for such persons, upon the order of the superior court of the county in which he resides, as follows:—

1. The court must be satisfied, upon examination in open court, and in the presence of such persons, from the testimony of two reputable physicians, that such person is of unsound mind, and unfit to be at large;

2. After the order is granted, the person alleged to be of unsound mind, his or her husband or wife, or relative to the third degree, or any citizen, may demand an investigation before a jury, which must be conducted in all respects as under an inquisition of lunacy.

Restoration to Capacity: See § 546, *post*.

"Insane persons received in the asylum must, upon recovery, be discharged therefrom." Cal. Pol. Code, sec. 2197.

"Whenever it appears by affidavit to the satisfaction of a magistrate of the county that any person within the county is so far disordered in his mind as to endanger health, person, or property, he must issue and deliver to some peace-officer for service a warrant, directing that such person be arrested and taken before any judge of a court of record within the county for examination." Cal. Pol. Code, sec. 2210.

"When the person is taken before the judge he must issue subpoenas to two or more witnesses, best acquainted with such insane person, to appear and testify before him at such examination." Cal. Pol. Code, sec. 2211.

"The judge must also issue subpoenas for at least two graduates of medicine to appear and attend such examination." Cal. Pol. Code, sec. 2212.

"At the examination, the person subpoenaed must appear and answer all questions pertinent to the matter under investigation." Cal. Pol. Code, sec. 2213.

"The physicians must hear such testimony, and must make a personal examination of the alleged insane person." Cal. Pol. Code, sec. 2214.

"The physicians, after hearing the testimony and making the examination, must, if they believe such person to be dangerously insane, make a certificate, under their hand, showing as near as possible, — 1. That such person is so far disordered in his mind as to endanger health, person, or property; 2. The premonitory symptoms, apparent cause or class of insanity, the duration and condition of the disease; 3. The nativity, age, residence, occupation, and previous habits of the person; 4. The place from whence the person came, and the length of his residence in this state." Cal. Pol. Code, sec. 2215.

"The certificate must be made in the form prescribed by, and, if they can be had, upon blanks furnished by, the medical superintendent of the asylum." Cal. Pol. Code, sec. 2216.

"The judge, after such examination and certificate made, if he believes the person so far disordered in his mind as to endanger health, person, or property, must make an order that he be confined in the insane asylum. A copy of such order shall be filed with and recorded by the county clerk of the county. The clerk shall also keep in convenient form an index-book, showing the name, age, and sex of each person so ordered to be confined in the insane asylum, with the date of the order, and the name of the insane asylum in which the person is ordered to be confined. No fees shall be charged by the clerk for performing any of the duties provided for by this section." Cal. Pol. Code, sec. 2217.

"The insane person, together with the order of the judge and certificate of the physicians, must be delivered to the sheriff of the county, and by him must be delivered to the officer in charge of the insane asylum." Cal. Pol. Code, sec. 2218.

"Any moneys found on the person of an insane person at the time of arrest must be certified to by the judge, and sent with such person to the asylum, there to be delivered to the medical superintendent, who must deliver the same to the treasurer. If the sum exceeds one hundred dollars, the excess must be applied to the payment of the expenses of such person while in the asylum; if the sum is one hundred dollars or less, it must be kept and delivered to the person when discharged, or applied to the payment of funeral expenses, if the person dies at the asylum." Cal. Pol. Code, sec. 2219.

"No case of idiocy or imbecility, or simple febleness of mind, must be maintained at, nor must any case of delirium tremens be admitted into, the asylum." Cal. Pol. Code, sec. 2220.

An act entitled an act to provide for the future management of the state asylums for the insane. Cal. Stats. 1885, p. 32.

SEC. 1. The judge of the superior court of any county in this state shall inquire into the ability of insane persons committed by him to the asylum to

bear the actual charges and expenses for the time that such person may remain in the asylum. In case an insane person committed to the asylum under the provisions of this act shall be possessed of real or personal property sufficient to pay such charges and expenses, the judge shall appoint a guardian for such person, who shall be subject to all the provisions of the general laws of this state in relation to guardians, as far as the same are applicable; and when there is not sufficient money in the hands of the guardian, the judge may order a sale of the property of such insane person, or so much thereof as may be necessary, and from the proceeds of such sale the guardian shall pay the board of trustees the sum fixed upon by them each month, quarterly, in advance, for the maintenance of such ward; and he also shall, out of the proceeds of such sale or such other funds as he may have belonging to such ward, pay for such clothing as the resident physician shall from time to time furnish such insane person; and he shall give a bond, with good and sufficient sureties, payable to the board of trustees, and approved by the judge, for the faithful performance of the duties required of him by this act, as long as the property of his insane ward is sufficient for the purpose. If indigent insane persons have kindred of degree of husband or wife, father, mother, or children, living within this state, of sufficient ability, who are otherwise liable, said kindred shall support such indigent insane person to the extent prescribed for paying patients. The board of trustees shall furnish such blank bonds as are required by this section to the several judges in this state. A breach of any bond provided for in this act may be prosecuted in the superior court of any county in this state in which any one of the obligors may reside, and the same shall be prosecuted by the district attorney of the county in which the action shall be brought, and shall be conducted throughout, and the judgment enforced, as in a civil action for the recovery of a debt. Should there remain in the hands of the board of trustees, or their treasurer, at the time any insane person is discharged, any money unexpended, so paid by the guardian or kindred, the same shall be refunded; *provided*, that the board of trustees shall not be required to refund any money for a fraction of a month; but upon the death of any insane person, after paying the ordinary burial expenses, the remainder of any moneys received from the guardians, or on deposit with the board of trustees or their treasurer, shall be refunded to the person or persons thereto entitled, on demand. Any moneys found on the person of any insane person at the time of arrest shall be certified to by the judge and sent with such person to the asylum, there to be delivered to the treasurer, to be applied to payment of the expenses of such person while in the asylum; but upon the recovery of such insane person, all sums remaining, after deducting such expenses, shall be returned to such person when discharged from the asylum. . . . The kindred or friends of an inmate of the asylum may receive such inmate therefrom on their giving satisfactory evidence to the judge of the court issuing the commitment that they, or any of them, are capable and suited to take care of and give proper care to such insane person, and give protection against any of his acts as an insane person. If such satisfactory evidence appear to the judge, he may issue an order, directed to the trustees of the asylum, for the removal of such person; but the trustees shall reject all other

orders or applications for the release or removal of any insane person, except the order of a court or judge on proceeding in *habeas corpus*; and if, after such removal, it is brought to the knowledge of the judge by verified statement that the person thus removed is not cared for properly, or is dangerous to persons or property by reason of such want of care, he may order such person returned to the asylum.

SEC. 2. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

An act entitled an act to establish a branch insane asylum for the insane of the state of California at Ukiah, to be known as the "Mendocino State Insane Asylum," and appropriating money therefor, approved February 20, 1889. Cal. Stats. 1889, p. 30.

Section 15 of this act is substantially the same as section 1, *supra*, the difference being in the different names by which similar officers are called.

An act to provide for the maintenance, support, and discharge in certain cases of insane persons confined in the state asylum for the insane, and for the control and management of a resulting contingent fund, approved March 19, 1890. Cal. Stats. 1889, p. 329.

SEC. 1. It shall be the duty of the sheriff of any county in this state, or other officer, immediately upon arresting any person charged with being insane, to notify the district attorney of the county in which said arrest is made of the fact of such arrest, and it shall be the duty of the district attorney of any county in this state, at the time of the commitment of an insane person to any state asylum of this state for the insane, by the judge of the superior court of such county, to make diligent inquiry into the ability of such insane person to bear the actual charges and expenses of maintenance and support for the time that such person may remain in the asylum, and said district attorney shall forthwith notify the board of trustees or board of directors, as the case may be, of the asylum to which such insane person shall be committed of the result of such inquiry.

SEC. 2. In case such insane person shall be, or shall thereafter become, the owner of property, real, personal, or mixed, it shall be the duty of the district attorney of the county from which such person shall have been committed, in case such insane person has no general guardian, to apply to the judge of the superior court making the order of commitment, for the appointment of a general guardian of the person and estate, or either, of such insane person; such application and appointment to be made in the manner as provided by the codes of this state for the application for appointment and appointment of guardians of infants and incompetent persons.

SEC. 3. At the hearing of such application, witnesses may be subpoenaed as in civil cases, and examined under oath to determine the character and value of the property of such insane person. Upon proof of the existence of property — real, personal, or mixed — belonging to such insane person, the judge or court hearing the application shall appoint a general guardian of the person and estate, or either, for such person, who shall be subject to all the provisions of the codes and general laws of this state in relation to guardians in other

cases, as far as the same may be applicable. If at any time there is not sufficient money in the hands of the guardian to pay the cost of the maintenance and support of said insane person, as hereinafter provided, and said insane person has other property, the judge of said superior court, or court, shall, upon the application of the guardian, or in case he shall neglect to apply, of the president of the board of directors or board of trustees, as the case may be, of the asylum to which such insane person has been committed or removed, order a sale of the property of such insane person, or so much thereof as may be necessary to pay the charges and expenses of maintaining and supporting such insane person at said asylum, said order to direct what property shall be sold; such sale to be made in the manner provided in the codes of this state for the sale of property and estates of deceased persons.

SEC. 4. From the proceeds of such sale, or from such other funds as the guardian may have belonging to such insane person, he shall pay to the board of trustees or board of directors, as the case may be, of the asylum to which such insane person has been committed, or to which he or she may have been removed, the sum per month fixed upon by them, quarterly, in advance, for the maintenance and support of such insane person; and he shall also, out of the proceeds of such sale or such other funds as he may have belonging to such insane person, pay for such clothing as the medical superintendent or resident physician of such asylum shall from time to time furnish to such insane person.

SEC. 5. The guardian of such insane person shall give a bond, with two good and sufficient sureties, payable to the board of trustees or board of directors, as the case may be, of the asylum to which such insane person has been committed or removed, and approved by the judge of said superior court for the faithful performance of his duties as such guardian.

SEC. 6. The secretary of state, under the advice and instruction of the attorney-general, shall have printed and furnish such blank bonds as are required by this act to the several superior courts of this state.

SEC. 7. A breach of any bond provided for in this act may be prosecuted by the board of trustees or board of directors, as the case may be, of the asylum to which such insane person has been committed or removed, in their own names, in the superior court of any county in this state in which any one of the obligors may reside, and in which the action shall be brought, and shall be conducted throughout, and the judgment therein enforced, as in a civil action for the recovery of a debt.

SEC. 8. If indigent insane persons have kindred of degree of husband, wife, children, other than minors, father or mother, living within this state, of sufficient pecuniary ability, who are otherwise liable, such kindred, in the order above named, shall support such indigent insane person by paying to the board of directors or board of trustees, as the case may be, of the asylum to which such insane person has been committed or removed, the sum per month fixed on by them, quarterly, in advance, for the maintenance and support of such indigent insane person, and such kindred, in the order above named, shall also pay for the clothing as the resident physician of such asylum shall from time to time furnish to such indigent insane person.

SEC. 9. For a failure to perform the duty devolving upon such kindred under the provisions of this act, an action may be brought by the board of trustees or board of directors, as the case may be, of the asylum to which such insane person has been committed or removed, in their own names, against said kindred, in the order above named. Such action may be prosecuted in the superior court of any county in this state in which said kindred, or either of them, may reside, and in which the action shall be brought, which action shall be conducted throughout, and the judgment therein enforced, as in a civil action for the recovery of a debt.

SEC. 10. Should there remain in the hands of the board of trustees or board of directors, as the case may be, of any asylum for the insane, or in the hands of their treasurer, at the time any insane person is discharged, any money unexpended, so paid by the guardian or kindred, the same shall be refunded; *provided*, that the board of trustees or board of directors, as the case may be, of said asylums shall not be required to refund any money for a fraction of a month; but upon the death of any insane person, after paying the ordinary burial expenses, the remainder of any moneys received from the guardian or kindred, or on deposit with the board of directors or board of trustees, as the case may be, of such asylum, or on deposit with their treasurer, shall be refunded to the person or persons thereto entitled, on demand. Any moneys found on the person of any insane person at the time of arrest shall be certified to by the judge, and sent with such person to the asylum, there to be delivered to the treasurer of the board of directors or board of trustees, as the case may be, of such asylum, to be applied to the payment of the expenses of such person while in the asylum, but upon the recovery of such person, all sums remaining, after deducting such expenses, shall be returned to such person when discharged from the asylum.

SEC. 12. The kindred, guardian, or friends of an inmate of any state asylum for the insane may receive such inmate therefrom on their giving satisfactory evidence to the judge of the court issuing the commitment, that they, or any of them, are capable and suited to take care of and give proper care to such insane person, and give protection against any of his acts as an insane person. If such satisfactory evidence appear to the court or judge, he may issue an order, directed to the medical superintendent or resident physician, as the case may be, of such asylum for the removal of such person; but the medical superintendent or resident physician, as the case may be, shall reject all other orders or applications for the release or removal of any insane person, except the order of a court or judge on proceedings in *habeas corpus*; and if after such removal it is brought to the knowledge of the judge by verified statement that the person thus removed is not cared for properly, or is dangerous to persons or property by reason of such want of care, the judge may order such person returned to the same asylum.

SEC. 13. This act shall not be so construed as to invalidate any existing claim occurring under the provisions of any prior statute in conflict with the provisions of this act.

SEC. 14. All acts in conflict with the provisions of this act are hereby repealed.

An act entitled an act to establish a branch insane asylum for the insane of the state of California at Ukiah, to be known as the "Mendocino State Insane Asylum," and appropriating money therefor, approved February 20, 1889. Cal. Stats., 1889, p. 29.

SEC. 13. A superior judge of any county in this state, and a superior judge of the city and county of San Francisco, shall, upon application under oath setting forth that a person, by reason of insanity, is dangerous to be at large, cause such person to be brought before him; and he shall summon to appear, at the same time and place, two or more witnesses who well knew the accused during the time of the alleged insanity, who shall testify under oath as to conversation, manners, and general conduct upon which said charge of insanity is based; and shall also cause to appear before him, at the same time and place, two physicians, who shall be regular graduates in medicine, before whom the judge shall examine the charge, and if, after a careful examination of the case, and personal examination of the alleged insane person, the said physicians shall certify on oath that the person examined is insane, and the case is of recent or curable character, or that the said person is of a homicidal, suicidal, or incendiary disposition, or that from any other violent symptoms the said insane person would be dangerous to his or her own life, or to the lives or property of the community in which he or she may live; and if said physicians shall also certify to the name, age, nativity, residence, occupation, length of time in this state, state last from, previous habits, premonitory symptoms, apparent cause and class of insanity, duration of the disease and present condition, as nearly as can be ascertained by inquiry and examination; and if the judge shall be satisfied that the facts revealed in the examination establish the existence of the insanity of the person accused, and that it is of a recent or curable nature, or of a homicidal, suicidal, or incendiary character, or that from the violence of the said symptoms the insane person would be dangerous to his or her own life, or to the lives or property of others, if at large, he shall direct the sheriff of the county, or some suitable person, to convey to and place in charge of the officers of the insane asylum of this state to which the order is directed such insane person, and shall transmit a copy of the complaint and commitment, and physician's certificate, which shall always be in the form as furnished to the court by the medical superintendent of said asylum; and the person taking such insane person to the insane asylum shall be allowed therefor the same fees as are allowed by law to the sheriff in such cases, to be paid in like manner. And the physicians attending the examination aforesaid shall be allowed by the board of supervisors of the county in which the examination is had five dollars each, unless they are otherwise paid.

SEC. 14. No case of idiocy, imbecility, harmless chronic mental unsoundness, or acute mania potu shall be committed to this asylum; and whenever, in the opinion of the superintendent, after a careful examination of the case of any person committed, it shall be satisfactorily ascertained by the said superintendent that the party had been unlawfully committed, and that he or she come under the rule of exemption provided for in this section, he shall have the authority to discharge such person so unlawfully committed, and re-

turn him or her to the county from which committed, at the expense of said county.

SEC. 16. Non-residents of this state, conveyed or coming herein while insane, shall not be committed to or supported in the state asylum for the insane; but this prohibition shall not prevent the commitment to and temporary care in said asylum of persons stricken with insanity while traveling or temporarily sojourning in the state, or sailors attacked with insanity upon the high seas and first arriving thereafter in some port within this state.

An act to prevent the overcrowding of asylums for the insane (Cal. Stats., 1885, p. 35) is a general law containing substantially the same provisions as § 14, *supra*.

The following forms are used in California:—

Form No. 247.—Proceedings for Commitment to Insane Asylum—Complaint.

State of California, }
County of ——. } In the matter of —, an insane person.

To Hon. —, Superior Judge of — County.

—, being duly sworn, says there is now in said county a person named — who is insane, and by reason of insanity dangerous to be at large, and is a proper subject for the insane asylum, and prays that such action may be had as the law requires, and that the said insane person may be sent to the asylum for the insane.

Subscribed and sworn to before me this — day of —,
A. D. 18—. —, Superior Judge.

Form No. 248.—Warrant of Arrest.

[Title of Court and Matter.]

The People of the State of California, to any Sheriff, Constable, Marshal or Policeman of the State of California.

It appearing to my satisfaction by the affidavit of — that —, who is within the — county of —, California, is so far disordered in his mind as to endanger health, person, and property, you are therefore commanded forthwith to arrest the above-named —, and to take him before —, judge of the superior court in and for the — county of —, California, at the hour of — o'clock, — M., on the — day of —, A. D. 18—, at the court-room of department No. — of the superior court of said — county, then and there to be dealt with according to law.

Dated —, 18—. —, Judge of the Superior Court.

Form No. 249.—Commitment.

The foregoing application having been made to me, —, superior judge of — county, and the person named in said application having been this day brought before me for examination on said charge of insanity, and having heard the testimony of — and —, witnesses, who have had frequent intercourse with the accused during the time of the alleged insanity, and Drs. — and —, graduates in medicine, after hearing the testimony of witnesses, and after a personal examination of the accused, have made the certificate by law required, and being myself satisfied that the said person is insane, and dangerous to be at large, and a proper subject for the insane asylum, I do hereby order the said — to be taken and placed in the Napa state asylum for the insane, and — is charged with the execution of this order.

As to the ability of the said insane person or his kindred to bear the charges or expenses for the time he may remain in the asylum, as well as all others matters pertaining to his interests or possessions, I find, after diligent inquiry, the facts to be as follows:—

1. The said insane person is — able to pay his expenses in the asylum, and I have — appointed — a guardian for him, and directed a quarterly payment in advance, and a supply of necessary clothing, together with the bond, to be forwarded to the asylum with him, as by law required of paying patients.

2. The said insane person has — kindred living in this state in the degree, as by law defined, viz., of sufficient ability to pay said expenses, and I have — made the assessment as by law directed in case of kindred able to pay.

3. There is — due the said insane person for —, and I have — taken steps by law required to be taken in such cases.

4. There — money (in his own right) on the person of said insane person, and —.

Witness my hand this — day of —, A. D. 18—.

—, Superior Judge of — County.

Form No. 250.—Physicians' Certificate.

State of California, }
 County of ——. }

We, ——— and ———, being sworn, do depose and say that we are graduates in medicine; that at the request and in the presence of Hon. ———, superior judge of said county, we have heard the testimony of witnesses and personally examined ——— in reference to the charge of insanity, and do find that he is insane, and by reason of insanity dangerous to be at large; that it is not a case of idiocy, or imbecility, or harmless, chronic, mental unsoundness, or acute mania a potu. The facts in support of this opinion (elicited by said examination) are set forth in the answers to the following questions, as nearly as can be ascertained:—

QUESTIONS.

1. Name.
2. Age.
3. Nativity.
4. Civil condition.
5. If children, how many, and the age of the youngest.
6. If female and married, maiden name and name of husband.
7. What state last from, and how long in California.
8. What occupation.
9. What evidence have you of the presence of insanity?
10. Is there a homicidal, suicidal, or incendiary disposition?
11. Is the case a recent one, having occurred within twelve months last past?
12. When did this attack first appear?
13. Is this the first attack? If not, when did others occur? and what their duration?
14. Is the disease increasing, decreasing, or stationary?
15. Are there rational intervals? If so, do they appear periodically?
16. Is there any permanent hallucination? If so, what is it?
17. In what way is the accused dangerous to be at large?
18. Is there a disposition to injure others? If so, is it directed especially to relatives? and is it from sudden passion or premeditation?

19. If suicidal, is the propensity now active? and in what way?

20. Is their a disposition of filthy habits, destruction of clothing, furniture, etc.?

21. Any relations, including grandparents and cousins, been insane?

22. Any peculiarities of temper, habits, disposition, or pursuits before the attack? Any predominant passions or religious impressions?

23. Been intemperate in the use of ardent spirits, wine, opium, or tobacco, in any form?

24. Suffered from epilepsy, suppressed secretions, eruptions, discharges, or sores, or injured on the head?

25. Any change in the physical health since the attack?

26. The supposed cause of insanity.

27. Of what class of insanity?

28. What treatment has been pursued? and with what effect?

29. Post-office address, number of house (if any), of relative or friend.

—, M. D.

—, M. D.

Subscribed and sworn to before me this — day of, — A. D. 18—.

Form No. 251. — Certificate.

I hereby certify that the within are true and correct copies of the original complaint, physicians' certificate, and commitment in the matter of —, an insane person, this day committed by me to the Napa state asylum for the insane.

Witness my hand this — day of —, 18—.

—, Superior Judge of — County.

Arizona. — "The probate judge of any county in this territory, upon the application, under oath, setting forth that a person, by reason of insanity, is dangerous, being at large, shall cause such a person to be brought before him for examination, and shall cause to be summoned to appear at such examination two or more witnesses acquainted with the accused at the time of the alleged insanity, who shall be examined on oath as to the conversation, manners, and general conduct of the accused, upon which such charge of insanity is based, and has also caused to appear before him one or more graduates of medicine, and reputable practitioners thereof, who shall be present at such examination, and who, upon hearing of the facts detailed by other witnesses, and a personal examination of the accused, shall set forth in a written state-

ment, to be made upon oath, — 1. His or their judgment as to the insanity of the party charged; 2. Whether it be dangerous to the accused, or to the person or property of others, by reason of said insanity, that said accused go at large; 3. Whether such insanity is, in his or their opinion, likely to prove permanent or only temporary; and upon such hearing and statements, as aforesaid, if the proofs shall satisfy the judge before whom such hearing is had that such party is insane, and that by reason of his or her insanity he or she be in danger, if at liberty, of injuring himself or herself, or the person or property of others, he shall, by an order entered of record in a book kept for that purpose, direct the confinement of such person in the territorial insane asylum, who shall be confined therein and not discharged therefrom until sufficiently restored to reason." Rev. Stats., sec. 2156.

"The probate judge, at the examinations mentioned in section 1 of this act [the last section], or at any time thereafter, may cause inquiry to be made into the ability of any insane person committed by him to bear the charges and expenses of his examination, commitment, and maintenance while in custody; and in any case where the insane person is able, by the possession of money or property, to pay such charges, or any portion of them, such judge shall appoint a guardian of such insane person, who, upon executing such bond as may be required by such judge, shall be authorized to take into his possession and control all the property, real and personal, of such insane person, and may, upon application to the probate judge of the proper county, obtain an order for the sale of such property, whether the same be real or personal, in like manner as such sales are ordered by said courts in cases of deceased persons; *provided*, that if such insane person have a family in this territory, no such order of sale shall be had of any property not subject to execution and forced sale. The guardian appointed as hereinbefore mentioned shall pay the cost of the examination and the expenses of commitment and maintenance of said insane person from the money and proceeds of the sale of the property of said insane person, and shall, from time to time, make a report of the expenditures in this behalf to the probate judge, at his order, until all is expended; or should said insane person be discharged, then the said guardian shall make a final settlement before the probate judge, and shall deliver to the person so discharged all the money and property remaining in his hands as guardian of said insane person." Rev. Stats., sec. 2158.

"The sheriff shall serve all processes in the above-mentioned proceedings, and shall receive the same fees as for similar services in the district court." Rev. Stats., sec. 2159.

Montana. — Same as California, section 258, *supra*. Comp. Stats., p. 378, sec. 431.

"From and after the passage of this article it shall be the duty of the probate judge, or, in his absence or inability to act, the chairman of the boards of the county commissioners of the several counties of this territory, upon the application of any person under oath, setting forth that any person, by reason of insanity, is unsafe to be at large, or is suffering under mental derangement, to cause the said person to be brought before him at such time and place as he may direct, and the said judge or commissioner shall also cause

to appear, at the same time and place, a jury of three citizens of his county, one of whom shall be a licensed practicing physician, who shall proceed to examine the person alleged to be insane, and if such jury, after careful examination, shall certify, upon oath, that the charge is correct, and the same probate judge or commissioner is satisfied that such person, by reason of insanity, is unsafe to be at large, or is incompetent to provide for his or her own proper care and support, and has no property applicable for such purpose, and has no kindred in the degree of husband or wife, father or mother, children, or brother or sister, living within this territory, of sufficient means and ability to provide for such care and maintenance, or if he or she have such kindred within the territory and such kindred fail or refuse to properly care for and maintain such insane person, such judge or county commissioner shall make out duplicate warrants reciting such facts, and place them in the hands of the sheriff of said county, who shall immediately, in compliance therewith, convey the person or persons therein named, and deliver him, her, or them to the contractor aforesaid,¹ at the place designated in the notification herein required, and such contractor¹ shall acknowledge, by indorsement in writing upon the back of each of said warrants, the delivery of such persons described therein to him, and the date thereof; and such sheriff shall return one of said warrants to the officer issuing the same, and forward the other to the secretary of the board of commissioners aforesaid, who shall file and preserve the same." Comp. Stats., sec. 1215.

Nevada. — "The district judge of any judicial district in this state shall, upon application, under oath, setting forth that a person, by reason of insanity, is dangerous to be at large, cause said person to be brought before him, and he shall summon to appear, at the same time and place, two or more witnesses having had frequent intercourse with the accused during the time of the alleged insanity, who shall testify under oath as to conversation, manners, and general conduct upon which said charge of insanity is based; and he shall also cause to appear before him, at the same time and place, two graduates in medicine, before whom the district judge shall examine the charge, and if, after a careful hearing of the case, and a personal examination of the alleged insane person, the said physicians shall certify on oath that the case is of a recent or curable character, or that the said insane person is of a homicidal, suicidal, or incendiary disposition, or that from any other violent symptoms the said insane person would be dangerous to his or her own life, or to the lives and property of the community in which he or she may live; and if said physicians shall also certify to the name, age, nativity, residence, occupation, length of time in this state, state last from, previous habits, premonitory symptoms, apparent cause and class of insanity, duration of the disease and present condition, as nearly as can be ascertained by inquiry and examination, and if the district judge shall be satisfied that the facts in the examination establish the existence of insanity in the person of the accused of a recent or curable nature, or if a homicidal, suicidal, or incendiary character, or from the violence of the symptoms the said insane person would be dangerous to his or her own life, or to the lives and property of others, to be at large, he shall

¹ See Comp. Stats., p. 984, sec. 1211.

direct the sheriff, or some other suitable person, to convey to the capital of the state, and place such insane person in charge of the secretary of state, and shall transmit duplicate copies of the complaint, commitment, and physicians' certificate, which shall always be in form as furnished to the judges by the secretary of state; . . . *provided*, that should the examination reveal the fact that the person proven to be insane is indigent, as defined by section 4 of this act [Gen. Stats., sec. 1459], the expenses of examination, transmission, and all charges incidental thereto shall be paid by the county of which said insane person was a resident, and in no case shall such expenses be paid by the state; *provided further*, that no case of idiocy, or imbecility, or simple feebleness of intellect, or old cases of dementia, or any other class of old, incurable, and harmless insanity, or any case of delirium tremens, shall be received and provided for by the secretary of state." Gen. Stats., sec. 1457.

Clerk may hold examination.

"Whenever, by reason of the absence of the district judge from the county, an insane person cannot be brought before him for examination, he may be taken before the county clerk of such county, and thereupon said county clerk shall be vested with power to hold such examination, and discharge such person or commit him to the insane asylum, in the same manner as may be now done by the district judge." Stats. 1889, p. 40, sec. 1.

Oregon. — "The county judge of any county in this state shall, upon application of any citizen, in writing, setting forth that any person or persons, by reason of insanity or idiocy, as the case may be, is suffering from neglect, exposure, or otherwise, or is unsafe to be at large, or is suffering under mental derangement, shall cause such person or persons to be brought before him at such time and place as he may direct, and the said county judge shall also cause to appear, at the same time and place, one or more competent physicians, who shall proceed to examine the person or persons alleged to be insane or idiotic; and if said physician or physicians, after careful examination, shall certify upon oath that said person or persons are insane or idiotic, as the case may be, then such judge, if, in his opinion, such person or persons be insane or idiotic, shall cause said person or persons to be conveyed to and placed in the insane asylum of the state of Oregon; *provided*, that an appeal shall lie from the county court in such cases, and in the same manner as is provided for appeals from the county court in other cases; *provided further*, that no insane or idiotic person shall be sent to an asylum, under the provisions of this act, who has friends that desire to provide for their safe-keeping and medical treatment; *provided further*, that in case of the sickness or absence of the county judge, or inability to act, from any cause, the sheriff shall notify any justice of the peace in his county to act in place of said county judge, and the said justice of the peace shall exercise the power herein conferred upon the county judge." Hill's Laws, sec. 3557.

"The county judge shall cause to be recorded in the records of the county court the proceedings had upon such application, and the judgment of the court. When the patient is adjudged insane, he shall make a warrant reciting his findings, the cause or causes of insanity, where the same can be ascertained, together with the name, age, nativity, and present residence of the

patient. The warrant shall be recorded in the records of the county court, one copy of which shall be sent with the patient to the superintendent of the asylum, another shall be sent to the secretary of state and filed in his office; the person committed shall be conveyed to the asylum by any proper person or persons selected and designated by the county judge." Hill's Laws, sec. 3558.

Utah. — "The judges of the probate courts shall have cognizance of all applications for admission to the asylum, or for the safe-keeping otherwise of insane persons within their respective counties, except in cases otherwise provided for. For the purpose of discharging the duties required of them, they shall have power to issue subpoenas and compel obedience thereto, to administer oaths, and do any act of a court necessary and proper in the premises." Comp. Laws, sec. 1966.

"Applications for admission to the asylum must be made in the form of an information, verified by affidavit, alleging that the person in whose behalf the application is made is believed by the informant to be insane, and a fit subject for custody and treatment in the asylum; that such a person is found in the county and has a residence therein, if such is known to be the fact, and if such residence is not in the county, where it is, if known, or where it is believed to be, if the informant is advised on the subject." Comp. Laws, sec. 1967.

"On the filing of such information, the probate judge of the county in which such person resides, if a resident of the territory, and if a non-resident, then the probate judge of the county in which such person is found, may examine the informant under oath, and if satisfied there is reasonable cause therefor, shall at once investigate the grounds thereof. For this purpose, he may require that the person for whom such admission is sought be brought before him, and the judge may issue his warrant therefor to the sheriff or any constable of the county, which shall be in form as follows:—

"Territory of Utah, }
County of ——. } ss.

"To —, greeting.

"You are hereby commanded to forthwith arrest —, alleged to be an insane person, and bring him before me, and make due returns hereof.

"Witness my hand and seal of the probate court of — County, this — day of —, A. D. 18—. —, Probate Judge.

"He may provide for the suitable custody of such person until the investigation shall be concluded. If he shall be of the opinion from such preliminary inquiries that he may make, that the presence of the accused would probably be injurious to such person, or attended with no advantage, he may dispense with such presence. In the examination he shall hear testimony for and against such application. Any citizen of the county, or any relative of the person alleged to be insane, may appear and resist the application, and the parties may appear by counsel if they so elect. The probate judges shall cause to appear before him two practicing physicians in medicine, before whom the judge shall examine the charge, and if, after a careful hearing of the case, and after a personal examination of the alleged insane person, the said physicians shall certify on oath that the person examined is insane, and the case is

of a recent or curable character, or that the said insane person is of a homicidal, suicidal, or incendiary disposition, or that from any other violent symptoms the said insane person would be dangerous to his or her own life or to the lives or property of the community in which he or she may live, and in connection with their examination the said physicians shall endeavor to obtain from the relatives or others who know the facts correct answers, so far as may be, to the interrogations hereinafter required to be propounded in such cases, which interrogatories shall be attached to their certificates.

"The physician's certificate herein provided for shall be in form as follows: —

"PHYSICIANS' CERTIFICATE.

"Territory of Utah, }
County of —, } ss.

"— and —, being duly sworn, both certify, each for himself, that he is a practicing physician in medicine; that at the request and in the presence of Hon. —, judge of —, he has heard the testimony and personally examined the said — in reference to the charge of insanity, and both find that — is insane, and so far disordered in his mind as to endanger health, person, or property, and that said insanity is not a case of idiocy, imbecility, or simple feebleness of mind; the further facts appertaining to said case as nearly as can be ascertained are set forth in the answer of the following questions: —

"1. Name.

"2. Age.

"3. Nativity.

"4. Married or single.

"5. If children, how many, their names, ages, and residences.

"6. If female and married, maiden name and name of husband.

"7. What state last from, and how long in Utah.

"8. What occupation.

"9. What evidence have you of the presence of insanity?

"10. Is there a homicidal, suicidal, or incendiary disposition?

"11. Is the case a recent one, having occurred within twelve months last past?

"12. When did this attack first appear?

"13. Is this the first attack? if not, when did others occur? and what their duration?

"14. Is the disease increasing, decreasing, or stationary?

"15. Are there rational intervals? If so, do they occur periodically?

"16. Is there any permanent hallucination? If so, what is it?

"17. In what way is the accused dangerous to be at large?

"18. Is there a disposition to injure others? If so, is it directed especially to relatives? Is it from sudden passion or premeditated?

"19. If suicidal, is the propensity now active? and in what way?

"20. Is there a disposition to filthy habits, destruction of clothing, furniture, etc.?

"21. Have any relatives, including grandparents and cousins, been insane?

"22. Any peculiarity of habits, temper, disposition, etc., or pursuits or religious impressions?

"23. Been intemperate in the use of ardent spirits, wine, opium, or tobacco, in any form?

"24. Suffered from epilepsy, suppressed secretions, eruptions, discharges, or sores, or injured in the head?

"25. Any change in the physical health since the attack?

"26. The supposed cause of insanity.

"27. Of what class of insanity?

"28. What treatment has been pursued? and with what effect?

"29. Post-office address, street, and number of house of relative or friend.

"—, M. D.

"—, M. D.

"Subscribed and sworn to before me this — day of —, A. D. 18—.

"—, Probate Judge."

— Comp. Laws, sec. 1968.

"On the return of the physicians' certificate, the probate judge shall, as soon as practicable, conclude his investigations; and shall find whether the person alleged to be insane is insane; whether, if insane, a fit subject for treatment and custody in the asylum; whether the residence of such person is in such county; and if not in such county, where it is, if ascertained. If he find such person is not insane, he shall order his immediate discharge, if in custody. If he find such person insane, and a fit subject for custody and treatment in the asylum, he shall order said person to be committed to the asylum, except as in section 25¹ of this act provided, and unless said person so found to be insane (or some one in his or her behalf) shall appeal from the finding of said judge to the district court of the judicial district in which such judge resides, the judge shall forthwith issue his warrant with duplicate thereof, stating such findings, with the residence of the person, if found, which warrant shall be in the following form, viz.:—

"WARRANT OF COMMITMENT.

"Territory of Utah, }
County of —. } ss.

"I —, probate judge of the county of —, territory of Utah, upon affidavit of —, caused to be brought before me for examination on a charge of insanity, and having heard the testimony of — and —, witnesses who have been acquainted with the accused during the alleged insanity, and Drs. — and —, practicing physicians, after hearing the testimony of witnesses and after a personal examination of the accused, and having made the certificate by law required, find that the said — is insane, and is a fit subject for custody and treatment in the asylum, that the residence of — is in — county, territory of Utah, and — is — indigent and is — able to bear the actual charges and expenses for the time — may remain in the asylum,—I therefore order the said —, a — male, aged — years, to be confined in the territorial insane asylum at Provo City, and — is charged with the execution of this order.

"Witness my hand this — day of —, A. D. 18—.

"—, Judge of the Probate Court."

— Comp. Laws, sec. 1969.

¹"Section 25 of this act" is section 1964 of Utah Compiled Laws, and treats only of financial transactions.

"The probate judge shall transmit to the medical superintendent all money or other property found on the person of any insane person at the time of arrest, and certify thereto in form as follows:—

"Territory of Utah, }
County of ——. } ss.

"I, —, probate judge of — county, certify that the sum of \$— and — property was found on the person of said — at the time of his arrest, which the said — is ordered to deliver to the medical superintendent of the territorial insane asylum; that I have appointed — a guardian for said —, and directed a quarterly payment, in advance, together with a fund to be forwarded to the said asylum with the said —, as by law required of paying patients.

"Witness my hand this — day of —, A. D. 18—.

"—, Probate Judge.

"The medical superintendent shall, upon receipt of such money or other property, as herein provided, deliver the same to the treasurer, to be applied to the payment of the expenses of said patient while in the asylum, but upon recovery of such insane person, all sums remaining unexpended, or other property, shall be returned to him when he is discharged from the asylum."

— Comp. Laws, sec. 1970.

"The probate judge shall deliver to the sheriff of the county, or other person appointed to execute the warrant, certified copies of the affidavit, warrant of commitment, and a certificate of property found on the person, and appointment of guardian, and the sheriff or other person appointed shall execute the aforesaid warrant by conveying such person to the asylum and delivering him, with such affidavit, commitment, and certificates, to the medical superintendent thereof. The medical superintendent shall acknowledge such delivery on the original warrant, which the sheriff shall return to the clerk of the probate court with his costs and expenses indorsed thereon. The sheriff shall be allowed for his personal service in conveying a patient to the asylum and returning therefrom, at the rate of three dollars for the necessary time actually employed, and mileage at the rate of seven cents per mile for the distance actually and necessarily traveled. In the absence of the sheriff or his deputy, or their inability to act, the probate judge may appoint some suitable person to execute the warrant, who shall take and subscribe an oath to discharge the duties thereof; he shall be entitled to the same fees as the sheriff or other persons so appointed; may, by consent of the probate judge, take to his aid such assistance as he may need to execute said warrant; *provided*, that no female shall be thus taken to the asylum without the attendance of some other female or some relative. The medical superintendent shall in his acknowledgment of delivery state whether there was such person in attendance, and give the name and names, if any, but if any relative or immediate friend of the patient who is a suitable person shall so request, he shall have the privilege of executing such warrant in preference to the sheriff or any other person taking such oath, and for so doing he shall be entitled to his necessary expenses, but no fees." Comp. Laws, sec. 1971.

"In case an insane person committed to the asylum under the provisions of

this act shall be possessed of real or personal property sufficient to pay such charges and expenses, the judge shall appoint a guardian for such person, who shall be subject to all the provisions of the general laws of this territory in relation to guardians as far as the same are applicable, and when there is not sufficient money in the hands of the guardian, the judge may order a sale of the property of such insane person, or so much thereof as may be necessary, and from the proceeds of such sale the guardian shall pay to the board of directors the sum fixed upon by them, quarterly, in advance, for the care and keeping of such ward, and he shall, out of the proceeds of such sale or such other funds as he may have belonging to his ward, pay for such clothing as the medical superintendent shall from time to time furnish such patient; *provided*, that if such insane person have a family in this territory, no such order of sale shall be had of any property exempt from execution and forced sale." Comp. Laws, sec. 1972.

"The guardian shall give a bond, with good and sufficient sureties, payable to the treasurer of the asylum, and approved by the probate judge, for the faithful performance of the duties required of him by this act, so long as the property of his insane ward is sufficient for the purpose. The form of such bond shall be as follows: —

"BOND.

"Know all men by these presents, that whereas —, of —, in the county of —, an insane person, has been admitted as a patient in the territorial insane asylum for Utah Territory, situated at Provo City, in said territory, in consideration of the following agreement, —

"Now, therefore, we, the undersigned, in consideration thereof, jointly and severally bind ourselves to —, treasurer of said asylum, to pay to him and his successors in office the sum of — dollars and — cents per week for the care and board of said insane person, so long as — shall continue in said asylum, and his property is sufficient for that purpose, with such extra charges as may be occasioned by requiring more than ordinary care and attention, and to provide with suitable clothing, and also to pay all expenses incurred by sending said patient to — friends, in case one or either of us shall fail to remove said patient when required to do so as aforesaid; and if — shall be removed at the request of friends before the expiration of three calendar months after reception, then to pay board for thirteen weeks, unless — shall be sooner cured, and also to pay not exceeding fifty dollars for all damages — may do to the furniture or other property of the asylum, and for reasonable funeral expenses in case of death. Such payments for board and clothing to be made quarterly, on the first days of — in each year, and at the time of removal, with interest on each bill from and after the time it becomes due.

"In witness whereof, we have hereunto set our names this — day of —, in the year —.

"Name —, P. O. —,

"Name —, P. O. —.

"Territory of Utah, }
County of —. } ss.

"—, being duly sworn, deposes and says that he is a resident in this territory and a freeholder therein, and is worth the sum of one thousand dollars

over and above all his debts and liabilities, exclusive of property exempt from execution.

"Subscribed and sworn to before me this — day of — 18—.

— [SEAL]

[The same oath to be taken on separate jurats by each surety. — ED.]

"This will certify that I am personally acquainted with — and —, the signers of the above bond, and consider each of them fully responsible for the prompt discharge of its obligations. Name —, Office —, P. O. —.

"*Provided*, that when the property in the hands of the guardian subject to sale shall be exhausted, the probate judge shall give notice thereof to the board of directors, and thereafter the territory shall be liable for the costs of care and keeping of the indigent insane."

— Comp. Laws, sec. 1973.

"Upon the commitment of any person to the territorial insane asylum, the probate judge who committed such person shall immediately transmit a copy of the affidavit, physicians' certificate, and warrant of commitment to the parties liable for the cost of commitment, and care and keeping of such insane person in the asylum. If, at any time subsequent to the commitment of an insane person in the asylum, it shall come to the knowledge of the probate judge committing such person that he has a residence in some other county of the territory, or that any person is liable for the cost of commitment or care and keeping of the person committed, he shall forthwith transmit to such county or person a copy of the affidavit, warrant of commitment, and certificate aforesaid, as also the amount of costs for which the person or county is liable." Comp. Laws, sec. 1974.

"The kindred or friends of an inmate of the asylum may receive such inmate therefrom upon giving satisfactory evidence to the probate judge issuing the commitment that they are capable and suitable to take charge of and give proper care to such insane person, and upon giving a bond to said court in the following form:—

"Territory of Utah, }
County of —. } ss.

"Know all men by these presents, that we, — as principal, and — and — as sureties, are held and firmly bound unto the people of the territory of Utah in the sum of — dollars, lawful money of the United States of America, to be paid to the treasurer of the territorial insane asylum, for which payment well and truly to be made we bind ourselves, our executors and administrators, jointly and severally, firmly by these presents.

"Sealed with our seals and dated this — day of —, A. D. 18—.

"The condition of the above obligation is such, that whereas an order was made by the probate judge of — County, territory of Utah, directing the medical superintendent of the territorial insane asylum to deliver the person of —, an insane person, to —, the — of said insane person, the said order being that the said — will take charge of and properly care for the said —, that he will obey all orders of the said judge of the probate court relating to the proper care and custody of said patient, and that he will return said — to

the asylum when so ordered by the said judge, and will obey the laws of the territory relating to insane persons, —

"Now, therefore, if the said — shall faithfully perform the duties and comply with the requirements therein set forth, then this obligation shall be void and of no effect; else to remain in full force and virtue.

" — [SEAL]

" — [SEAL]

" — [SEAL]

" — [SEAL]

"Signed, sealed, and delivered in the presence of —.

" —.

"Territory of Utah, }
County of —. } ss.

" — and —, being duly sworn, each deposes and says that he is a resident of this territory and a freeholder therein, and is worth the sum of — dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

" —

" —

"Subscribed and sworn to before me this — day of —, A. D. 18—.

" —, Probate Judge.

"On filing the foregoing bond and making proof as herein required, the probate judge shall issue his order to the medical superintendent directing him to deliver said insane person to the party making the application for the custody of said insane person, which order shall be in the following form: —

"Territory of Utah, }
County of —. } ss.

"To the Medical Superintendent of the Territorial Insane Asylum.

"Whereas — has made application for the custody of —, an insane person who was by me committed to the territorial insane asylum on the — day of —, 18—, and he having complied with the provisions of the law in such cases made and provided, you are hereby directed to deliver the said —, an insane person, to —.

—, Probate Judge.

"And if, after such removal, it is brought to the knowledge of the judge that the person thus removed is not cared for properly, or is dangerous to persons or property by reason of such want of care, he may order such person returned to the asylum; *provided*, no patient who may be under a criminal charge or conviction shall be discharged from the asylum without the order of the court having jurisdiction of such case."

— Comp. Laws, sec. 1975.

"When it shall appear, upon affidavit filed, or other evidence, that any person is not insane, and is unjustly deprived of his liberty, the board of directors shall order an immediate inquiry into the merits of the case by the probate judge of the county in which such insane person is held; and for the purpose of such inquiry, said judge is hereby invested with authority to make all orders necessary for the proper discharge of said duty.

"If, on such examination, it shall appear to said judge that the said person is not insane, he shall order his immediate discharge, by using the following order, to wit:—

"Territory of Utah, }
County of —, } ss.

"To the Medical Superintendent of Territorial Insane Asylum, greeting.

"Having this day examined —, a person heretofore committed to the insane asylum, and having adjudged the said — as being now sane and restored to reason, you are therefore directed to return said — to the county of —, at the expense of said county. —, Probate Judge.

"If found to be insane, they shall order his continued detention, and may order the parties demanding such inquiry to pay the costs of the examination."

—Comp. Laws, sec. 1976.

"The provisions herein made for the support of the insane at public charge shall not release the estate of such persons from liability for their support, and the territorial auditor of public accounts is authorized and empowered to collect from the estate of such persons any sums paid by the territory in their behalf." Comp. Laws, sec. 1978.

"Upon receipt of the copy of affidavit and warrant of commitment from the probate judge, the parties therein charged with the cost of commitment and of care and keeping, or any other persons acting in behalf of such persons committed, may appeal from any order made in such commitment to the district court for the district wherein such patient may reside, by filing with the probate judge committing such patient, within ten days thereafter, a notice setting forth the order from which such appeal is taken; if such notice be not given within the time herein prescribed, such parties shall be deemed to have waived such right of appeal, and shall be bound by all orders made in such warrant of commitment." Comp. Laws, sec. 1981.

"Any insane person found at large, and not in care of some proper person, shall be arrested by any peace-officer, and shall be immediately taken before the probate judge of the county in which such arrest is made." Comp. Laws, sec. 1983.

"No person supposed to be insane shall be restrained of his liberty by any other person, otherwise than in pursuance of authority obtained as herein provided, excepting for such brief period as may be necessary for the safety of persons and property, and until such authority can be obtained." Comp. Laws, sec. 1984.

"On information laid before the probate judge of any county that a certain insane person in the county [is] suffering for want of proper care, the said judge shall forthwith inquire into the matter, and if he find the information well founded, he shall make all needful provision for the care of said person." Comp. Laws, sec. 1987.

"On receipt of notice from the board of directors that any person committed to the asylum is refused admission therein for want of room, the probate judge shall require that such patient be suitably provided for until such admission can be had or until the occasion therefor no longer exists. If such person is indigent, the county shall be entitled to receive from the territory a sum equal to the amount allowed by the territory for costs of care and keeping of indigent patients in the insane asylum." Comp. Laws, sec. 1988.

Washington. — "The superior court of any county in this state, or the judge thereof, upon the application of any person under oath, setting forth

that any person, by reason of insanity, is unsafe to be at large, shall cause such person to be brought before him, and he shall summon to appear at the same time and place two or more witnesses, who shall testify, under oath, as to conversation, manners, and general conduct upon which said charge of insanity is based; and shall also cause to appear before him, at the same time and place, two reputable physicians, before whom the judge shall examine the charge, unless the accused, or any one in his or her behalf, shall demand a jury to decide upon the question of insanity. If such demand be made, the trial shall be by jury. If no jury be demanded, and the said physicians, after a careful hearing of the case and a personal examination of the alleged insane person, shall certify under oath that the person examined is insane, and the case is of a recent or curable character, or that the said insane person is of a homicidal, suicidal, or incendiary disposition, or that from any other violent symptoms the said insane person would be dangerous to his or her own life, or the lives and property of the community in which he or she may live; and if said physicians shall also certify to the name, age, nativity, residence, occupation, length of time in this state, state last from, previous habits, premonitory symptoms, apparent cause and class of insanity, duration of the disease, and present condition, as nearly as can be ascertained by inquiry and examination; and if the judge shall be satisfied that the facts revealed in the examination establish the existence of the insanity of the person accused, and that it is of a recent or curable nature, or of a homicidal, suicidal, or incendiary character, or that from the violence of the symptoms the said insane person would be dangerous to his or her own life, or to the lives and property of others, if at large, he shall order such insane person sent to the hospital for the insane. If the trial has been by jury, and the accused declared insane by said jury, and the insanity be of the character above described, the said insane person shall be ordered by the judges to be sent to the hospital for the insane." Gen. Stats., sec. 1248.

"Whenever the superior judge shall order an insane person sent to the hospital for the insane, he shall issue a warrant directed to the sheriff, commanding him to convey such insane person to the hospital for the insane, and place such insane person in charge of the superintendent of the hospital for the insane to which the order is directed, and he shall transmit a copy of the complaint and commitment, and physician's certificate, which shall always be in the form as furnished to the courts by the superintendent of the hospital for the insane; *provided*, the superior judge, at his discretion, or superintendent, on application of the relatives or friends, may send him or her to either hospital for the insane." Gen. Stats., sec. 1249.

"Whenever the superior judge of any county shall, by reason of sickness or other cause, be unable to attend at his office and perform the duties required by this act, said duties shall be performed by any judge of the superior court of any adjacent county, upon the applicant filing an affidavit setting forth the inability of the proper superior judge to attend to the duties of his office." Gen. Stats., sec. 1250.

"The superior courts of the state shall have power to commit to the hospital for the insane any person who, having been arraigned for an indictable

offense, shall be found by the jury to be insane at the time of such arraignment." Gen. Stats., sec. 1252.

"No case of idiocy, imbecility, harmless chronic mental unsoundness, or acute mania a potu shall be committed to the hospital for the insane." Gen. Stats., sec. 1254.

"Non-residents of this state conveyed or coming herein while insane shall not be committed to nor supported in the hospital for the insane; but this prohibition shall not prevent the commitment to and temporary care in said hospital of persons stricken with insanity while traveling or temporarily sojourning in the state, or sailors attacked with insanity upon the high seas, and first arriving thereafter in some port within this state." Gen. Stats., sec. 1255.

"No person laboring under any contagious or infectious disease shall be admitted into the hospitals for the insane." Gen. Stats., sec. 1256.

"If any patient shall escape from the hospital, the superintendent shall cause immediate search to be made for him, and if he cannot soon be found, shall cause notice of such escape to be forthwith given to the superior judge of the county where the patient belongs; and if such patient is found in his county, the superior judge shall cause him to be returned, and shall issue his warrant therefor as in other cases, unless he does not consider his return necessary, of which fact he shall notify the superintendent." Gen. Stats., sec. 1259.

"The relatives or friends of any person charged with insanity, or who shall be found to be insane under this act, shall in all cases have the right to take charge of and keep said insane person, if they shall desire so to do; but the superior judge may require a bond of such relatives or friends, conditioned for the proper and safe keeping of such person." Gen. Stats., sec. 1265.

"The relatives or friends of an inmate of the hospital for the insane may receive such inmate therefrom on their giving a bond or other satisfactory evidence to the superior judge issuing the commitment that they, or any of them, are capable and suited to take care of and give proper care to such insane person, and give protection against any of his acts as an insane person. If such satisfactory evidence appear to the judge, he may issue an order directed to the superintendent of the hospital for the insane for the removal of such person. If, after such removal, it is brought to the knowledge of the judge, by verified statement, that the person thus removed is not cared for properly, or is dangerous to persons or property by reason of such want of care, he may order such person returned to the hospital." Gen. Stats., sec. 1266.

Wyoming. — "The determination of the insanity or incompetency of any person shall be by a jury, as in civil actions. When it is in vacation to determine the fact of insanity or incompetency of any person, it shall be done by the judge or court commissioner or clerk, who shall issue an order to call an open venire to the sheriff, who shall summon six men to act as a jury, who shall possess the qualifications of jurors, and the proceedings thereafter shall be in all respects as near as may be in civil actions in term time." Laws 1890-91, p. 307, sec. 2.

"The jury, in addition to finding upon the question of the sanity or insanity of the person, shall find the value of his estate, if any, or whether he is a pauper. If he has an estate, the judge, commissioner, or clerk presiding over the pro-

ceeding shall appoint a guardian of the person and estate of such person, and such guardian shall take charge of the estate of such insane person in the manner provided by law in relation to guardianship." Laws 1890-91, p. 307, sec. 3.

"The estate of an insane person shall be entitled to the same exemptions as to his creditors, and for the expense of his care while insane, as are provided by law in case of the estates of decedents. Property and money to cover such exemptions shall be sequestered and set apart by the judge by the finding of the jury aforesaid, for the private use of the family, or for the person himself. The balance of his estate, if any, may be used under the direction of the court or judge for the care of such insane person or his family, if he have one, in such proportions as may be ordered, until the same is exhausted. After that he shall be supported and cared for at public expense, as provided by law for insane persons, until his death, or disability is removed." Laws 1890-91, p. 307, sec. 4.

"The verdict of the jury shall be entered upon the journals, and have the same effect as if the verdict has been rendered during a term thereof." Laws 1890-91, p. 307, sec. 5.

"Whenever a person has been declared insane or incompetent by a jury as aforesaid, the expense of the proceedings to determine such fact shall be charged against the estate of such person. If he has no estate, such expense shall be charged against and borne by the county in which the proceeding is had. If the complaint that any person be insane or incompetent be made by any person other than a county officer, and the jury, upon submission of such question to them, declare that such person is not insane or is not incompetent, then the person making such complaint shall pay the expense of such proceeding." Laws 1890-91, p. 307, sec. 6.

"Every guardian appointed as provided in the preceding section has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward in like manner and with like conditions as before prescribed with respect to the guardian of a minor." Laws 1890-91, p. 308, sec. 7.

"If any insane person be admitted into the state insane asylum as a patient, the guardian shall pay for his support and expenses at such asylum, out of the estate of such ward; and if such insane person shall, at any time, come under the class of 'insane poor persons,' as specified in the law for the government of the state insane asylum and the care of the insane, such person shall be supported and maintained at such asylum." Laws 1890-91, p. 308, sec. 8.

"For the purposes of this chapter, whenever the words 'person of unsound mind' or 'insane person' occur therein, said words shall be construed to mean either an idiot, or a lunatic, or a person of unsound mind, and incapable of managing his own affairs, as the case may be, upon proof as aforesaid." Laws 1890-91, p. 308, sec. 10.

"If any guardian shall publish for four weeks in some newspaper published in the county where the proceedings are had, if there be one, and if not, in the nearest newspaper to such county, a notice of his intention to apply to the court or judge to resign his guardianship, and the court or judge, on proof of such publication, shall believe that he should be permitted to resign, the court

or judge shall so order, and appoint other guardians, who may assume the maintenance of the patient at the state insane asylum; in the event of the patient being at the time an inmate of said asylum, the court shall have authority to provide for the safe-keeping and medical treatment, in the state insane asylum, of such lunatic, idiot, or person of unsound mind, in the manner provided by law in relation to such like persons residents of the several counties." Laws 1890-91, p. 308, sec. 11.

"If any person shall allege, in writing, verified by oath or affirmation, that any person declared to be of unsound mind has been restored to his right mind, the court or judge by which the proceedings were had shall cause the facts to be inquired into by a jury." Laws 1890-91, p. 308, sec. 12.

"The court shall cause notice of the trial to be given to the guardian of the person so declared insane or incompetent, if there be a guardian, and to his or her husband or wife, if there be one, or to his or her father or mother, if living in the county. On the trial, the guardian or relative of the person so declared insane or incompetent, and, in the discretion of the court, any other person, may contest the right to the relief demanded. Witnesses may be required to appear and testify, as in civil cases, and may be called and examined by the court on its own motion. If it be found that the person be of sound mind and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardian of such person, if such person be not a minor, shall cease." Laws 1890-91, pp. 308, 309, sec. 13.

Appointment of guardian is petition or on notice to the insane person: *Sprigg v. Stump*, 7 Saw. 280.
valid though not made on verified

CHAPTER XIX.

GUARDIAN AND WARD.

ARTICLE I. GUARDIANS OF MINORS.

- II. GUARDIANS OF INSANE AND INCOMPETENT PERSONS.
- III. SPENDTHRIFTS AND DRUNKARDS.
- IV. THE POWERS AND DUTIES OF GUARDIANS.
- V. THE SALE OF PROPERTY AND DISPOSITION OF PROCEEDS.
- VI. NON-RESIDENT GUARDIANS AND WARDS.
- VII. GENERAL AND MISCELLANEOUS PROVISIONS.
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ARTICLE I.

GUARDIANS OF MINORS.

- § 515. Judge to appoint guardians.
- § 516. When minor may nominate guardian — When not.
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- § 519. Father or mother entitled to guardianship.
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- § 524. Letters of guardianship and bond to be recorded.
- § 525. Maintenance of minor out of income of property.
- § 526. Guardian to give bond — Powers limited.
- § 527. Power of courts to appoint guardians and next friend.

§ 515. [1747.] **Judge to Appoint Guardians.** — The superior court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. Before making such appointment, the court must cause such notice as such court deems reasonable to be given to any person having the

care of such minor, and to such relatives of the minor residing in the county as the court may deem proper.

Arizona. — Same. Rev. Stats., secs. 1307, 1308.

Idaho. — Same. Rev. Stats., sec. 5770.

Montana. — Same. Comp. Stats., p. 362, sec. 351; p. 363, sec. 352.

Granting Letters, etc.: See Mont. Laws 1891, p. 219, under § 10, *ante*.

Nevada. — Same. Gen. Stats., secs. 548, 549.

Oregon. — Same as first sentence. Hill's Laws, sec. 2880.

"Whenever it becomes the duty of the county court to appoint a guardian for a minor, the relations of such minor, whether male or female, upon application to the proper county court, shall in all cases be appointed, the nearest relative having precedence; *provided*, that said applicant shall be of good moral character, and be otherwise competent to discharge the duties of guardian to such ward." Hill's Laws, sec. 2879.

Utah. — Same as California. Comp. Laws, sec. 4305.

Washington. — "The superior court of each county, when it shall become necessary, may appoint guardians to minors resident in said county who have no guardian appointed by will, or who may reside out of the state, having estate within the county." Code Proc., sec. 1128.

Wyoming. — Same as California, except that "superior" is changed to "district," and after "county" the words "or the judge thereof in vacation" are inserted. After the words "the court," in last sentence, the words "or judge" are added, and all words after "in the county," in last sentence, are omitted. Laws 1890-91, p. 304, sec. 1.

Minors. — Section 25 of the California Civil Code defines minors to be, — 1. Males under twenty-one years of age; and 2. Females under eighteen years of age.

Ages are to be computed from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority: Cal. Civ. Code, sec. 26.

Authority of a Parent Ceases. — 1. Upon the appointment by a court of a guardian of the person of the child; 2. Upon the marriage of the child; 3. Upon its attaining majority: Cal. Civ. Code, sec. 204.

Remedy for Parental Abuse: Cal. Civ. Code, sec. 203.

Guardian when Infant is Party to Action: Cal. Civ. Code, secs. 372, 373.

See § 332, *ante*, and § 548, *post*.

The power of appointing guardians is vested in this state, — 1. In the father; 2. In the mother; 3. In the court of probate: *Lord v. Hough*, 37 Cal. 657, where will be found a discussion of the various classes of guardians at common law, and the statutory changes.

Residence of minor, what constitutes, to give court jurisdiction to

appoint guardian: *In re Raynor*, 74 Cal. 421.

Application for letters of guardianship should be made in the county where the proposed ward resides: *In re Tittel*, Myr. Prob. 97.

Where a petition for letters of guardianship over the person of a minor is presented and filed in the superior court of one county, and

citation is issued and served on the parties interested, such court has jurisdiction to hear and determine whether the minor is a resident of that county, and whether the petitioner is a proper person to be appointed guardian. Its jurisdiction so to proceed is not ousted by the fact that, subsequent to the service of the citation, one of the parties served obtained the issuance of letters of guardianship to himself in the superior court of another county: *In re Danneker*, 67 Cal. 643.

A guardian is estopped from denying the jurisdiction of the court which appointed him or the legality of his appointment, if he has qualified under the order of said court as guardian: *Fox v. Minor*, 32 Cal. 111.

In this state, courts of chancery have the same control as similar courts in England over the persons and estates of minors: Const. 1850, art. 6, sec. 6. This jurisdiction cannot be divested by the legislature. Probate courts have not exclusive original jurisdiction over these matters: *Wilson v. Roach*, 4 Cal. 362.

In the appointment of a guardian, the parental request is entitled to great weight, and ought to prevail, unless good reason to the contrary be shown: *Badenhoof v. Johnson*, 11 Nev. 87.

An appointment of guardian of the person or estate of a minor is invalid except upon petition filed and after notice of the application: *Badenhoof v. Johnson*, 11 Nev. 87.

It is a grave irregularity to appoint a stranger as guardian of the person and estate of an infant within three days after petition filed, and without

notice to the infant's relatives and its custodian: *In re Winkleman*, 9 Nev. 303.

The superior court has general jurisdiction of the matter of the appointment of guardians, and, as an incident to its jurisdiction, it has the power to hear and determine whether a testamentary guardian has been legally appointed or not; but if the fact of the appointment of a guardian by will or deed were established, the superior court has no jurisdiction to appoint a guardian, and its order appointing a guardian would be a nullity: *Murphy v. Superior Court*, 84 Cal. 592.

An order appointing a guardian for a minor under fourteen years is not void for want of formal notice to the person having custody of the minor, and to resident relatives of the minor, if all persons entitled to such notice appear and consent to the appointment: *Smith v. Biscailuz*, 83 Cal. 344.

An appointment of a guardian without giving any notice whatever is void: *Seavers v. Gerke*, 3 Saw. 353.

In appointing a guardian, the record must affirmatively show that every act essential to give jurisdiction to the court has been performed: *Seavers v. Gerke*, 3 Saw. 353.

Where the appointment of a guardian is void, all subsequent proceedings in that matter, including sales of realty, are void: *Seavers v. Gerke*, 3 Saw. 353. See *Walker v. Goldsmith*, 14 Or. 125.

The appointment of guardians is an exercise of jurisdiction pertaining to probate courts: *Monastes v. Oatlin*, 6 Or. 119.

Form No. 252. — Petition for Appointment of Guardian.

[Title of Court.]

In the matter of the guardianship of —, a minor.

The petition of — respectfully shows that — is a minor of the age of — years, residing in the — county of —, state of —;

That said minor is the owner of certain real and personal property situated in this county, which is described as follows, to wit (here insert description);

That said property is of the value of about \$—, and the annual rents and profits thereof amount to the sum of \$—; that said property needs the attention and care of a guardian;

That said minor has no guardian legally appointed by will, deed, or otherwise;

That petitioner is the father of said minor; that the relatives of said minor residing in this county are —, —, and —; that said minor is at present residing with and under the care of —, residing in the — county of —, state of —;—

Wherefore your petitioner prays that he be appointed guardian of the estate of said minor.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 253.—Order Directing Notice of Application for Letters of Guardianship.

[Title of Court and Guardianship.]

The petition of — to be appointed guardian of the (person and) estate of —, a minor, having been heretofore filed in this court, it is ordered that personal notice of said application be issued by the clerk of this court, directed to —, —, and —, relatives of said minor, residing in this county, and to —, the person who has the care of such minor, and that said notice be served on said parties personally at least five days prior to the time fixed herein for the hearing of said petition.

The hearing of said petition is hereby set for the — day of —, A. D. 18—, at the hour of — o'clock, — M., at the courtroom of this court.

—, Judge of the — Court.

Dated —, 18—.

Form No. 254.—Notice to Relatives of Application for Letters of Guardianship.

[Title of Court and Guardianship.]

To —, —, and —.

Take notice that — has heretofore filed in the above-entitled court his petition to be appointed guardian of the (person and) estate of —, a minor; that said petition has been set for hearing by said court on the — day of —, A. D. 18—, at the hour of — o'clock, — M., at the courtroom of

said court, at which time and place you may appear and show cause, if any you can, why said — should not be appointed such guardian.

In witness whereof, I, William B. Hamilton, clerk of said superior court, have hereunto set my hand this — day of —, A. D. 18—.

—, Clerk.

By —, Deputy Clerk.

Form No. 255. — Consent of Relatives.

[Title of Court and Guardianship.]

The undersigned, relatives of —, a minor, hereby consent that — may be appointed guardian of the (person and) estate of said minor.

Dated —, 18—.

Form No. 256. — Order Appointing Guardian.

[Title of Court and Guardianship.]

The matter of the appointment of a guardian of the (person and) estate of —, a minor, coming on regularly for hearing this day, and it appearing that said minor is a resident of the — county of —, state of —, and has property in the — county of —, state of —, —

It is ordered that — be and he is hereby appointed guardian of the (person and) estate of said —, a minor, upon his filing a bond in the penal sum of — dollars, conditioned according to law.

—, Judge of the — Court.

Dated —, 18—.

§ 516. [1748.] **When Minor may Nominate Guardian — When not.** — If the minor is under the age of fourteen years, the court may nominate and appoint his guardian. If he is fourteen years of age, he may nominate his own guardian, who, if approved by the court, must be appointed accordingly.

Arizona. — Same. Rev. Stats., sec. 1303.

Idaho. — Same. Rev. Stats., sec. 5771.

Montana. — Same. Comp. Stats., p. 363, sec. 352.

Nevada. — Same. Gen. Stats., sec. 549.

Oregon. — Same. Hill's Laws, sec. 2881.

Utah. — Same. Comp. Laws, sec. 4306.

Washington. — "If the minor is under fourteen years of age, the judge may nominate and appoint his guardian; if said minor be over fourteen years of age, he or she may nominate the guardian, who, if approved by the superior court, shall be appointed accordingly; *provided*, that no judicial officer, excepting justice of the peace, no person of unsound mind, or a party convicted of felony, or a misdemeanor involving moral turpitude, shall be appointed guardian, and when a guardian shall incur either of the foregoing disabilities, he shall be displaced. If a guardian becomes superior judge, the superior court of the proper county shall appoint his successor." Code Proc., sec. 1129.

Wyoming. — Same as California, except that after "court" the words "or judge" are added each time it occurs. Laws 1890-91, p. 304, sec. 2.

Form No. 257. — Nomination of Guardian by Minor.

[Title of Court and Guardianship.]

The undersigned, a minor, being of the age of fourteen years, nominates as the guardian of his (person and) estate —, and respectfully requests the court to appoint him as such guardian.

Dated—, 18—.

§ 517. [1749.] When Appointment may be Made by Judge when Minor is over Fourteen. — If the guardian nominated by the minor is not approved by the court, or if the minor resides out of the state, or if, after being duly cited by the court, he neglects for ten days to nominate a suitable person, the court or judge may nominate and appoint a guardian in the same manner as if the minor were under the age of fourteen years.

Arizona. — Same. Rev. Stats., sec. 1309.

Idaho. — Same. Rev. Stats., sec. 5772.

Montana. — Same. Comp. Stats., p. 363, sec. 353.

Nevada. — Same. Gen. Stats., sec. 550.

Oregon. — Same, except phrase "for ten days" omitted. Hill's Laws, sec. 2881.

"When such minor, being above the age of fourteen years, shall reside more than ten miles from the place of holding the county court, his nomination of a guardian may be certified to the judge thereof by a justice of the peace, which shall have the same effect as if made in the presence of the court or judge." Hill's Laws, sec. 2882.

Utah. — Same as California. Comp. Laws, sec. 4307.

Washington. — Same as California. Code Proc., sec. 1130.

Wyoming. — Same as California, except that the words "or judge" follows "court" every time it occurs. Laws 1890-91, p. 304, sec. 3.

§ 518. [1750.] Nomination by Minors after Arriving at Fourteen. — When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor, at any time after he attains that age, may appoint his own guardian, subject to the approval of the court.

Arizona. — Same. Rev. Stats., sec. 1310.

Idaho. — Same. Rev. Stats., sec. 5773.

Montana. — Same. Comp. Stats., p. 363, sec. 354.

Nevada. — Same. Gen. Stats., sec. 551.

Utah. — Same. Comp. Laws, sec. 4308.

Washington. — "When a guardian has been appointed for any minor under the age of fourteen, such guardian shall not be removed when such minor arrives at the age of fourteen, except for good cause shown." Code Proc., sec. 1131.

Wyoming. — Same as California, except that the words "or judge" follow "court" every time it appears. Laws 1890-91, p. 305, sec. 4.

§ 519. [1751.] Who may be Guardian. — The father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person. The person nominated by a minor of the age of fourteen years as his guardian, whether married or unmarried, may, if found by the court competent to discharge the duties of guardianship, be appointed as such guardian. The authority of a guardian is not extinguished nor affected by the marriage of the guardian. [Amendment approved March 31, 1891; took effect in sixty days.] Cal. Stats. 1891, p. 136.

Arizona. — "The father of the minor, if living, and in case of his decease the mother, while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor." Rev. Stats., sec. 1311.

Idaho. — Same as Arizona. Rev. Stats., sec. 5774.

Montana. — Same as Arizona. Comp. Stats., p. 363, sec. 355.

Nevada. — Same as Arizona. Gen. Stats., sec. 552.

Oregon. — Same as Arizona to and including the word "entitled"; then as follows: "To the custody of the person of the minor, and to the care of his education." Hill's Laws, sec. 2883. See also Hill's Laws, sec. 2879, under § 530, *ante*.

Utah. — Same as Arizona, except that the words "while she remains unmarried" are omitted. Comp. Laws, sec. 4309.

Washington. — "The father of the minor, if living, and in case of his de-
 cease the mother, being themselves respectively competent to transact their
 own business, shall be entitled to the guardianship of a minor." Code Proc.,
 sec. 1132.

Wyoming. — Same as Washington, except that after the word "mother"
 these words are added, "while she remains unmarried," and in lieu of "shall"
 these words are inserted, "and not otherwise unsuitable, must." Laws 1890-
 91, p. 305, sec. 5.

Corporations may be Guardians, etc.: See § 76, *ante*.

**Appointment of Guardian by will or by deed, when to take effect and
 by whom made:** See § 497, *ante*.

Guardianship of girls should be
 given to mother who is divorced from
 father, when his competency is ques-
 tionable, if she is competent: *In re*
Austerhaudt, Myr. Prob. 18.

**Order appointing a father as
 guardian** may make directions con-
 cerning the custody of the person of
 ward: *In re Linden*, Myr. Prob. 215.

**A general guardian may con-
 test the account of an adminis-**

trator even though an attorney be
 appointed by the court to represent
 his ward: *In re Rose*, 66 Cal. 241; see
 note to § 542, *post*.

**The parent, as such, has no control
 over the property of the child:** Cal.
 Civ. Code, sec. 202. A parent has no
 power as guardian of property of a
 minor, except by the appointment of
 a court: *Kendall v. Miller*, 9 Cal. 591;
 § 498, *ante*.

§ 520. [1752.] Minor having No Father or Mother.

—If the minor has no father or mother living, competent to
 have the custody and care of his education, the guardian ap-
 pointed shall have the same.

Arizona. — Same. Rev. Stats., sec. 1312.

Idaho. — Same. Rev. Stats., sec. 5775.

Montana. — Same. Comp. Stats., p. 363, sec. 356.

Nevada. — Same. Gen. Stats., sec. 553.

Utah. — Same. Comp. Laws, sec. 4310.

Washington. — Same. Code Proc., sec. 1133.

Wyoming. — Same. Laws 1890-91, p. 305, sec. 6.

§ 521. [1753.] Powers and Duties of Guardian.—

Every guardian appointed shall have the custody and care of
 the education of the minor, and the care and management of
 his estate, until such minor arrives at the age of majority or mar-
 ries, or until the guardian is legally discharged.

Arizona. — Same. Rev. Stats., sec. 1313.

Idaho. — Same. Rev. Stats., sec. 5776.

Montana. — Same. Comp. Stats., p. 353, sec. 357.

Nevada. — Same. Gen. Stats., sec. 554.

Oregon. — Same, except that guardianship continues until minor reaches
 twenty-one years, or guardian is legally discharged. Hill's Laws, sec. 2883.

Utah. — Same as California. Comp. Laws, sec. 4311.

Washington. — Same as California, except that the phrase "or until the guardian is legally discharged" is omitted. Code Proc., sec. 1134.

Wyoming. — Same as California, except that in lieu of the words "or marries," after the word "majority," these words are inserted, "and in case of a girl, until she marries or arrives at the age of majority." Laws 1890-91, p. 305, sec. 7.

Guardians are not entitled to long as parent is living and worthy: the custody and tuition of ward so *Lord v. Hough*, 37 Cal. 657.

§ 522. [1754.] Bond of Guardian, Conditions of. — Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the court must require of such person a bond to the minor, with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law, and the following conditions shall form a part of such bond, without being expressed therein: —

1. To make an inventory of all the estate, real and personal, of his ward, that comes to his possession or knowledge, and to return the same within such time as the court may order;

2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward;

3. To render an account, on oath, of the property, estate, and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs; and at the expiration of his trust to settle his accounts with the court, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto.

Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form, the letters of guardianship must be substantially the same as letters of administration; and the oath of the guardian must be indorsed thereon that he will perform the duties of his office as such guardian according to law.

Arizona. — Same. Rev. Stats., sec. 1314.

Idaho. — Same. Rev. Stats., sec. 5777.

Montana. — Same. Comp. Stats., p. 363, sec. 353.

Nevada. — Same, except that after "as he shall order," the following is interpolated: "And when the penal sum of the bond exceeds two thousand dollars, each of the sureties may become liable for portions thereof, making in the aggregate the whole penal sum; and said bond shall be." Gen. Stats., sec. 555.

Oregon. — Same as California, except last two sentences, which are omitted, and the account is to be rendered within one year after appointment, and the bond is to be given to the state of Oregon. Hill's Laws, sec. 2384.

Utah. — Same as California. Comp. Laws, sec. 4312.

Washington. — "The court shall take of each guardian appointed under this act bond, with approved security, payable to the state of Washington, in a sum double the amount of the minor's estate, real and personal, conditioned as follows: The condition of this obligation is such, that if the above-bound A B, who has been appointed guardian for C D, shall faithfully discharge the office and trust of such guardian according to law, and shall render a fair and just account of his said guardianship to the superior court for the county of —, from time to time, as he shall thereto be required by said court, and comply with all orders of said court, lawfully made, relative to the goods, chattels, and moneys of such minor, and render and pay to such minor all moneys, goods and chattels, title papers and effects, which may come into the hands or possession of such guardian, belonging to such minor, when such minor shall thereto be entitled, or to any subsequent guardian, should such court so direct, this obligation shall be void, or otherwise to remain in full force and virtue, which bond shall be for the use of such minor, and shall not become void upon the first recovery, but may be put in suit from time to time against all or any one or more of the obligors, in the name and [for] the use and benefit of any person entitled by a breach thereof, until the whole penalty shall be recovered thereon." Code Proc., sec. 1136.

"It shall be the duty of every guardian of any minor, — 1. To make out and file, within three months after his appointment, a full inventory, verified by oath, of the real and personal estate of his ward, with the value of the same; and failing so to do, it shall be the duty of the court to remove him and appoint a successor; 2. To manage the estate for the best interest of his ward; 3. To render on oath to the proper court an account of his receipts and expenditures as such guardian, verified by [such] vouchers or proof, at least once in every two years, or whenever cited so to do; he shall receive no allowance for services, and be liable to said ward on his bond for ten per cent in damages on the whole amount of estate, both real and personal, in his hands belonging to such ward; 4. At the expiration of his trust, fully to account for and pay over to the proper person all the estate of said ward remaining in his hands; 5. To pay all just debts due from such ward out of the estate in his hands, and collect all debts due such ward, and in case of doubtful debts, to compound the same, and appear for and defend, or cause to be defended, all suits against such ward; 6. When any ward has no father or mother, or such father or mother is unable or fails to educate such ward, it shall be the duty of his guar-

dian to provide for him such education as the amount of his estate may justify." Code Proc., sec. 1138.

Wyoming. — Same as California, except that the judge may act as well as the court. Laws 1890-91, p. 305, sec. 8.

There is no estoppel to deny the fact of guardianship by reason of neglect to give the bond required by law, if no money or property appears to have been received by virtue of the appointment: *Murphy v. Superior Court*, 84 Cal. 592.

minor children, appointed by the court, does not become a guardian unless he gives the bond required by section 1754 of the Code of Civil Procedure; and the court has no power in its order of appointment to dispense with bonds: *Murphy v. Superior Court*, 84 Cal. 592.

A guardian of the property of

Form No. 258. — Bond of Guardian.

Know all men by these presents, that we, —, principal, and — and —, sureties, are held and firmly bound to —, a minor, in the sum of — dollars, lawful money of the United States, to be paid to the said —, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this — day of —, A. D. 18—.

The condition of the above obligation is such, that whereas by an order of the — court of the — county of —, in said state, duly made and entered on the — day of —, A. D. 18—, the above-bounden — was appointed guardian of the (person and) estate of said minor, upon executing a bond according to law, in said sum of — dollars, —

Now, therefore, if the said —, as such guardian, shall faithfully execute the duties of the trust according to law, then this obligation to be void, otherwise to remain in full force and effect.

— [SEAL]

— [SEAL]

Sealed and delivered in presence of —. — [SEAL]

State of —, }
County of —. }

—, being duly sworn, each for himself says that he is a —holder and resident within said state, and is worth the said sum of — dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this — day of —, A. D. 18—.

Form No. 259. — Letters of Guardianship.

[Title of Court and Guardianship.]

State of —, }
 County of —. } ss.

— is hereby appointed guardian of the (person and) estate of —, a minor.

Witness, —, clerk of the — court of the — county of —, with the seal thereof affixed, the — day of —, A. D. 18—. By order of the court.

[SEAL]

—, Clerk.

Oath of Office of Guardian: See Form No. 52, § 70, *ante*.

It is a breach of the bond if the guardian fails to render an account, etc., when his office of guardian ceases: *In re Allgier*, 65 Cal. 228. See also § 553, *post*, and notes.

Where a mother was appointed guardian of the person and estate of her minor son, and on the same day presented her bond, which was approved, a lease made by her of the ward's property on the following day was held valid, though no letters of guardianship had been issued to her, and she had not taken the oath of office: *Whyler v. Van Tiger*, Cal. Sup. Ct., Aug. 31, 1887 (No. 11931), not reported.

A lease purporting to be made by one tenant in common in her own right, and as guardian of the estate of

her co-tenant and ward, is valid, although signed and delivered as her individual deed: *Whyler v. Van Tiger*, Cal. Sup. Ct., Aug. 31, 1887 (No. 11931), not reported.

A ward, upon attaining his majority, sued his guardian and the sureties on the general bond, to recover moneys received by the guardian on sale of the ward's realty, and not accounted for. It was held that the suit could not be maintained, because the sale of real estate was not of the general duties of a guardian: *Henderson v. Coover*, 4 Nev. 429.

Act of guardian is ratified by ward unless the latter expressly disaffirms it within a reasonable time after attaining majority: *Brazee v. Schofield*, 2 Wash. Ter. 209.

§ 523. [1755.] Judge may Insert Conditions in Order Appointing Guardian. — When any person is appointed guardian of a minor, the court may, with the consent of such person, insert in the order of appointment conditions not otherwise obligatory, providing for the care, treatment, education, and welfare of the minor. The performance of such conditions shall be a part of the duties of the guardian, for the faithful performance of which he and his sureties on his bond shall be responsible.

Arizona. — Same. Rev. Stats., sec. 1315.

Idaho. — Same. Rev. Stats., sec. 5778.

Montana. — Same. Comp. Stats., p. 364, sec. 359.

Utah. — Same. Comp. Laws, sec. 4313.

Wyoming. — Same as California, except that "or judge" is inserted after "court" wherever that word occurs. Laws 1890-91, p. 306, sec. 9.

Guardians must send ward to school, under penalty of conviction of a misdemeanor: Cal. Stats. 1890, p. 135, secs. 130, 131.

Order appointing a father as guardian may make directions concerning the custody of the person of ward: *In re Linden*, Myr. Prob. 215.

§ 524. [1756.] Letters of Guardianship and Bond of Guardian to be Recorded.—All letters of guardianship issued, and all guardians' bonds executed under the provisions of this chapter, with the affidavits and certificates thereon, must be recorded by the clerk of the court having jurisdiction of the persons and estates of the wards.

Arizona.—Same. Rev. Stats., sec. 1316.

Idaho.—Same. Rev. Stats., sec. 5779.

Montana.—Same. Comp. Stats., p. 364, sec. 360.

Utah.—Same. Comp. Laws, sec. 4314.

Wyoming.—Same. Laws 1890-91, p. 306, sec. 10.

§ 525. [1757.] Maintenance of Minor out of Income of his Own Property.—If any minor, having a father living, has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the court; and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian.

Arizona.—Same. Rev. Stats., sec. 1317.

Idaho.—Same. Rev. Stats., sec. 5780.

Montana.—Same. Comp. Stats., p. 364, sec. 361.

Nevada.—Same. Gen. Stats., sec. 557.

Oregon.—Same. Hill's Laws, sec. 2876.

Utah.—Same. Comp. Laws, sec. 4315.

Washington.—See § 537, *ante*.

Wyoming.—Same, except that for "father" "parent" is used, and after "court" the words "or judge" are inserted. Laws 1890-91, p. 306, sec. 11.

When a guardian marries his ward's mother, the step-father, the maintenance of the ward should be a charge upon all three: *In re Mohlenhauer*, Myr. Prob. 162.

Form No. 260. — Petition for Allowance out of Income of Minor to Defray Expenses of Education, etc.

[Title of Court and Guardianship.]

—, the guardian of the person and estate of —, a minor, respectfully represents that the said minor has an income, derived from his estate, of about \$— per annum, which is amply sufficient to maintain and educate said minor; that —, the father of said minor, is not able financially to expend the sums required to maintain and educate said minor in a suitable manner; that it is for the best interest of said minor that he be sent to attend the State University at Berkeley, California, and that the sum of \$— per annum will be required to pay for his tuition, maintenance, necessary school books, etc., while he is attending said university;—

Wherefore petitioner asks an order of this court authorizing him to expend said sum of \$— annually, for the purposes hereinbefore mentioned.

—, Petitioner.

—, Attorney for Petitioner.

Form No. 261. — Order of Allowance out of Income of Minor to Defray Expenses of Education, etc.

[Title of Court and Guardianship.]

It appearing that —, a minor, has a sufficient annual income to maintain and educate him, and that his father is not able to maintain and educate him in a suitable manner,—

It is ordered that —, the guardian of the (person and) estate of said minor, be and he is hereby authorized to expend the sum of \$— annually, out of the income of said estate, for the purpose of maintaining and educating said minor.

Dated —, 18—.

—, Judge of the — Court.

§ 526. [1758.] Guardian to Give Bond—Powers Limited. — Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties with regard to the person and estate of his ward as guardians appointed by the court, except so far as their powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed.

Arizona. — Same. Rev. Stats., sec. 1335.

Idaho. — Same. Rev. Stats., sec. 5782.

Montana. — Same. Comp. Stats., p. 365, sec. 362.

Nevada. — Same. Gen. Stats., sec. 558.

Oregon. — Same. Hill's Laws, secs. 2885, 2886.

Utah. — Same. Comp. Laws, sec. 4316.

Washington. — The part of section beginning with the word "except" is omitted; otherwise same. Code Proc., sec. 1142.

Wyoming. — Same, except that "by the court" is omitted. Laws 1890-91, p. 306, sec. 12.

Powers and Duties of guardians: See § 536, *ante*, and notes.

A testamentary guardian cannot act as such until he qualifies and letters are issued to him: *Aldrich v. Willis*, 55 Cal. 81. See also *Norris v. Harris*, 15 Cal. 226.

A guardian appointed by deed must be considered as a testamentary guardian, since the appointment does

not take effect until the death of the parent; and in order to become a guardian by deed, it is not enough that he be named in the deed as guardian, but he must also qualify by giving bond, as required by testamentary guardians: *Murphy v. Superior Court*, 84 Cal. 592.

§ 527. [1759.] Power of Courts to Appoint Guardians and Next Friend not Impaired. — Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein.

Arizona. — Same. Rev. Stats., sec. 1336.

Idaho. — Same. Rev. Stats., sec. 5783.

Montana. — Same. Comp. Stats., p. 365, sec. 363.

Nevada. — Same, with the following added: "Nor to appoint or allow any person, as the next friend of a minor, to commence and prosecute any suit in his behalf." Gen. Stats., sec. 559.

Oregon. — Same. Hill's Laws, sec. 2887.

Utah. — Same. Comp. Laws, sec. 4317.

Washington. — Same, with the following added: "Or to commence and prosecute any suit in his behalf." Code Proc., sec. 1143.

"Guardians, by virtue of their office, as such, shall be allowed in all cases to prosecute and defend for their wards." Code Proc., sec. 1135.

Wyoming. — Same as California. Laws 1890-91, p. 306, sec. 13.

It is the duty of the guardian of an incompetent to appear for and defend an action against his ward: *Justice v. Ott*, 87 Cal. 530.

A guardian ad litem should be appointed to watch the interest of the ward: *Townsend v. Tallant*, 33 Cal. 45.

It is the duty of the general guardian to appear for his ward in an action, unless the court appoints a

guardian *ad litem* for that particular case: *Gronfier v. Puymiro*, 19 Cal. 629.

An administrator may also be guardian of an infant heir of the estate, but in a proceeding in the estate to sell property to pay debts, he is acting in hostility to his ward, and should not in such proceeding represent the ward.

ARTICLE II.

GUARDIANS OF INSANE AND INCOMPETENT PERSONS.

§ 528. Guardians of insane and other incompetent persons.

§ 529. Appointment after hearing.

§ 530. Powers and duties of such guardians.

§ 531. Restoration to capacity.

§ 528. [1763.] Guardians of Insane and Other Incompetent Persons. — When it is represented to the superior court, or a judge thereof, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced on the hearing.

Arizona. — Same. Rev. Stats., sec. 1337.

Idaho. — Same. Rev. Stats., sec. 5784.

Montana. — Same. Comp. Stats., p. 365, sec. 364.

Nevada. — Same. Gen. Stats., sec. 560.

Oregon. — Same to and including the word “appointed,” except as to time, which is ten days, and the phrase “or from any cause mentally incompetent to manage his property” is omitted; the balance of section following the word “appointed” is omitted. Hill’s Laws, sec. 2879.

Utah. — Same. Comp. Laws, sec. 4318.

Washington. — “The several superior courts shall have power to appoint guardians to take the care, custody, and management of all idiots, insane persons, and all who are incapable of conducting their own affairs; and of their estates, real and personal; the maintenance of themselves and families, and the education of their children.” Code Proc., sec. 1154.

Wyoming. — Same, except that “superior” is omitted, as is also the following: “Not less than five days before the time so appointed.” Laws 1890-91, pp. 306, 307, sec. 1.

Guardianship and Commitment of Insane Persons: See § 514, *ante*, and notes.

Corporations may be Guardians, etc.: See § 76, *ante*.

Lunatic may be Placed in an Asylum: See § 514, *ante*.

Service on Guardian: See § 332, *ante*.

Sale of Homestead where One of Spouses Insane: See § 143, *ante*.

A husband’s application for guardianship of insane wife denied when: *In re Fegan*, Myr. Prob. 10.

After the county court has adjudged a person insane, the ap- pointment of a guardian is valid, though not made on a verified petition and on notice to the insane person: *Sprigg v. Stump*, 7 Saw. 280.

Form No. 262. — Petition for Appointment of Guardian of Incompetent Person.

[Title of Court and Guardianship.]

— respectfully shows that he is a friend of —; that said — has for six months last past been in ill-health to such an extent that his mind has become impaired from the effects thereof, and that he is now incapable of taking care of his property and effects; that he has a large estate, a description of which is unknown to petitioner, and it is necessary that a guardian be appointed to collect and preserve his said estate; wherefore petitioner prays that he be appointed such guardian.

—, Attorney for Petitioner.

—, Petitioner.

(Verification as in Form No. 55, § 80, *ante*.)

Order fixing time and place of hearing the foregoing petition: See Form No. 28, § 26, *ante*.

Notice to incompetent: See Form No. 235, § 317, *ante*.

Proof of service: See Form No. 12, § 9, *ante*.

Form No. 263. — Another Form of Petition for Appointment of Guardian for Incompetent Person.

[Title of Court and Guardianship.]

The petition of — respectfully shows that she is a relative, to wit, the wife, of —, a resident of the — county of —, California;

That the said — is the owner and possessed and entitled to the possession of certain real and personal property situated in the — county of —, California, and described as follows, to wit (here insert description of property owned by alleged incompetent person);

That said — is now upwards of — years of age, and for more than one year last past has been and now is insane, and is wholly incompetent to transact his ordinary business, or to properly care for said property;

That he is laboring under delusions which have alienated his affections from his wife and family, which have caused him to threaten to dispose of the community property belonging to him and to your petitioner for the purpose of depriving his family thereof, and which have also created and induced in his mind a desire to kill his said wife and to make threats thereof; —

Wherefore petitioner prays that she be appointed guardian of the person and estate of said ——. ———, Petitioner.

———, Attorney for Petitioner.

(Verification as in Form No. 55, § 80, *ante*.)

§ 529. [1764.] Appointment after Hearing.—If, after a full hearing and examination upon such petition, it appear to the court that the person in question is incapable of taking care of himself and managing his property, such court must appoint a guardian of his person and estate, with the powers and duties in this chapter specified.

Arizona.—Same. Rev. Stats., sec. 1338.

Idaho.—Same. Rev. Stats., sec. 5785.

Montana.—Same. Comp. Stats., p. 365, sec. 365.

Nevada.—Same. Gen. Stats., sec. 561.

Oregon.—Same. Hill's Laws, sec. 2889.

"The several county courts, in their respective counties in this state, shall have power to appoint guardians to take care, custody, and management of the estates, real and personal, of all insane persons, idiots, and all who are incapable of conducting their own affairs, and the maintenance of their families and the education of their children." Hill's Laws, sec. 2888.

"The words 'insane person' are intended to include every idiot, every person not of sound mind, every lunatic and distracted person." Hill's Laws, sec. 2911.

Utah.—Same. Comp. Laws, sec. 4319.

Washington.—"If it be found by the court that the person so brought before the court is of unsound mind and incapable of managing his own affairs, the court shall appoint a guardian for the estate of such insane person." Code Proc., sec. 1155.

Form No. 264.—Order Appointing Guardian of Incompetent Person.

[Title of Court and Guardianship.]

It appearing that ——— has become an incompetent person from the effects of illness, and that it is necessary that a guardian of his person and estate should be appointed,—

It is ordered that ——— be and he is hereby appointed guardian of the person and estate of said ———, an incompetent person, upon filing in this court a bond in the penal sum of ——— dollars, conditioned according to law.

Dated ———, 18—. ———, Judge of the ——— Court.

§ 530. [1765.] Powers and Duties of Such Guardians.—Every guardian appointed, as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions as before prescribed with respect to the guardian of a minor.

See §§ 537, 539, and 541, *ante*.

Arizona.—Same. Rev. Stats., sec. 1339.

Idaho.—Same. Rev. Stats., sec. 5786.

Montana.—Same. Comp. Stats., p. 365, sec. 366.

Granting Letters, etc. See Mont. Laws 1891, p. 219, under § 10, *ante*.

Nevada.—Same. Gen. Stats., sec. 562.

Oregon.—Same. Hill's Laws, sec. 2890.

Utah.—Same. Comp. Laws, sec. 4320.

Washington.—“Every such guardian so appointed shall, before entering upon the duties assigned him, enter into bond to the board of county commissioners in such sum and with such security as the court shall approve, conditioned that he will take proper care of such insane person, and manage and minister his effects, to the best advantage, according to law; and that he will faithfully discharge all duties as such guardian which may by law, or by the order, sentence, or decree of any court of competent jurisdiction, devolve upon him; which bond shall be filed in the office of the clerk of the superior court; a copy thereof, duly certified, shall be evidence in all respects as the original.” Code Proc., sec. 1157.

“It shall be the duty of every such guardian, within twenty days after his appointment, to cause notice thereof to be published in some newspaper printed in this state, or otherwise publish such notice at such time and place and in such manner as the court shall decide.” Code Proc., sec. 1158.

“It shall be the duty of such guardian to collect and take into his possession the goods, chattels, moneys, effects, and other evidences of debt, and all writings touching the estate, real and personal, of the person under his guardianship.” Code Proc., sec. 1159.

“It shall be the duty of every such guardian to prosecute all actions commenced at the time of his appointment, or thereafter to be commenced, by or on account of his ward, and to defend all actions which may be brought against such ward.” Code Proc., sec. 1162.

“Every such guardian is authorized and required to collect all debts due to his ward, and give acquittances and discharges thereof, and adjust, settle, and pay all demands due and becoming due from his ward, so far as his estate and effects will extend.” Code Proc., sec. 1163.

Power of court—Sale—Mortgage—Lease of realty of insane.

“The superior court shall have power to make orders for the restraint, support and safe-keeping of such person, for the management of his estate, and the support and maintenance of his family and education of his children, out

of the proceeds of his estate; to set apart and reserve, for the use of such family, all property, real or personal, not necessary to be sold for the payment of debts; and to let, sell, or mortgage any part of such estate, real or personal, when necessary for the payment of debts, the maintenance of such insane person or his family, or the education of his children." Code Proc., sec. 1164.

Order directing mortgage, lease, or sale of realty of insane.

"Whenever the personal estate of such person shall be found to be insufficient to meet the foregoing requisitions, it shall be the duty of such guardian to lay the same before the superior court by whom he was appointed, setting forth the particulars relative to the estate, real and personal, of such person, and the debts by him owing, accompanied by a correct and true account of his doings therewith; whereupon it shall be the duty of such court to make an order directing the mortgage lease or sale, at his discretion, of the whole or such part of the real estate as may be necessary." Code Proc., sec. 1165.

Order, what to contain — Report of guardian, contents of.

"The court making such order shall direct the time and terms of such sale, mortgage, or lease of such estate, and the manner in which the proceeds shall be applied; and shall give due notice thereof, together with a full description of the property to be thus disposed of, at which time and place it shall be the duty of the guardian to execute the order of said court, and to make a full report of his doings therein, which report shall be accompanied by the affidavit of the guardian verifying the report, and stating that such guardian did not, directly or indirectly, become the purchaser thereof; or if otherwise disposed of, that he is not directly or indirectly interested personally in the agreement." Code Proc., sec. 1166.

Guardian to make deed, etc.

"When any such sale, mortgage, or lease is approved by the court ordering the same, as having been performed according to law, and not under such circumstances as to operate prejudicial[ly] to the interests of such ward, it shall be the duty of the guardian to execute a deed, mortgage, or other instrument of writing, which shall be as valid and effective in law as if executed by such ward when of sound mind and discretion." Code Proc., sec. 1167.

Disapproval of sale, etc. — Proceedings after.

"If such proceedings be disapproved by said court, the court may set them aside and proceed in like manner as if no sale had been made." Code Proc., sec. 1168.

Form of Deed: See § 200, *ante*.

Form of Mortgage: See § 222, *ante*.

Form of Lease: See § 223, *ante*.

Power to Appoint at chambers: See Cal. Code Civ. Proc., sec. 166; also § 1, *ante*.

The guardian of an old man may permit the business affairs of the ward to be managed by the ward's relatives who are conversant with his affairs, if his children and heirs at law request it, and if no creditor appears

to contest the account. Such a practice, however, is not to be encouraged, and is permissible only in exceptional cases: *Racoullat v. Requena*, 36 Cal. 651. See § 499, *ante*.

On filing the proper petition for

the appointment of a guardian of the person and estate of one alleged to be insane, and on giving the notice required by statute, the court acquires jurisdiction to adjudicate the question of insanity and to select a guardian. It is not restricted to the person to be appointed, even if the petition asks that the petitioner be appointed: *Hallett v. Patrick*, 49 Cal. 590.

Letters of guardianship of a

lunatic regularly issued by the court cannot be questioned in a collateral proceeding: *Warner v. Wilson*, 4 Cal. 310.

The power of the court to appoint a guardian for an insane person is not defeated by the fact that such person is married. If the person is a wife, there is no rule of law which prefers the husband of such guardian if he is unfit to perform the duties thereof: *In re Fegan*, 45 Cal. 176.

§ 531. [1766.] Proceeding for Restoration of Insane, etc.—Any person who has been declared insane or incompetent, or the guardian, or any relative of such person within the third degree, or any friend may apply, by petition, to the superior court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined. The petition shall be verified, and shall state that such person is then sane or competent. Upon receiving the petition, the court must appoint a day for a hearing before the court, and if the petitioner request it, shall order an investigation before a jury, which shall be summoned and impaneled in the same manner as juries are summoned and impaneled in civil actions. The court shall cause notice of the trial to be given to the guardian of the person so declared insane or incompetent, if there be a guardian, and to his or her husband or wife, if there be one, and to his or her father or mother, if living in the county. On the trial, the guardian or relative of the person so declared insane or incompetent, and, in the discretion of the court, any other person, may contest the right to the relief demanded. Witnesses may be required to appear and testify, as in civil cases, and may be called and examined by the court on its own motion. If it be found that the person be of sound mind, and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardian of such person, if such person be not a minor, shall cease.

Arizona.—Same, except incompetent persons are not included. *Rev. Stats.*, sec. 1340.

Idaho.—Same as California. *Rev. Stats.*, sec. 5787.

Montana.—Same as Arizona. *Comp. Stats.*, p. 365, sec. 366.

Utah.—Same as California, except that all references to jury are omitted. *Comp. Laws*, sec. 4321.

Washington. — "Whenever the court shall receive information that such ward has recovered his reason, he shall immediately inquire into the facts, and if he finds that such ward is of sound mind, he shall forthwith discharge such person from care and custody; and the guardian shall immediately settle his accounts and restore to such person all things remaining in his hands belonging or appertaining to such ward." Code Proc., sec. 1171.

Restoration to Capacity — Instructions of Code. — The provisions of section 1766 of the Code of Civil Procedure, authorizing the court to restore a person adjudged insane or incompetent, is only applicable to those for whom guardians have been appointed under section 1764 of the same code, and does not apply to persons committed to insane asylums under the regulation of the Political Code: *Kellogg v. Cochran*, 87 Cal. 192.

Discharge from Insane Asylum — Jurisdiction of Court — Habeas Corpus. — No court in this state is authorized to discharge a person who has been committed to an insane asylum, or to restore him to capacity, under any circumstances, except upon

writ of *habeas corpus*: *Kellogg v. Cochran*, 87 Cal. 192.

The power to discharge an inmate of an asylum otherwise than upon *habeas corpus* is vested exclusively in the officers of an asylum, and includes the power to determine whether the patient has recovered, and the authority to discharge persons who have sufficiently recovered, and also persons who have been improperly committed: *Kellogg v. Cochran*, 87 Cal. 192.

The effect of a discharge by officers of asylum of an insane inmate, if no guardian has been appointed under the act of March 9, 1885, is to restore the person discharged to legal capacity to sue: *Kellogg v. Cochran*, 87 Cal. 192.

Form No. 265.—Petition for Judgment Restoring to Capacity.

[Title of Court.]

In the matter of —, an alleged insane person.

The petition of — respectfully represents,—

1. That heretofore, to wit, on the — day of —, A. D. 18—, — made a complaint in writing before the Hon. —, judge of the — court of the — county of —, state of —, of which the following is a copy, to wit (here insert copy of complaint);

2. That thereupon said judge issued a warrant for the arrest of said —, and the same was delivered to a peace-officer for service;

3. That thereupon said — was arrested by said peace-officer as directed in said warrant and brought before said judge on the — day of —, A. D. 18—, to be dealt with according to law;

4. That thereupon said judge caused an investigation of the sanity of petitioner to be had before him;

5. That thereupon such proceedings were had, that petitioner

was duly adjudged to be insane, and by reason thereof dangerous to be at large;

6. That thereafter, on the — day of —, A. D. 18—, said judge made an order of commitment as follows, to wit (here insert copy of order); —

Now, therefore, your petitioner respectfully protests against the order aforesaid, and avers that he is not insane and is not dangerous to be at large;

And he further alleges that he is sane and peaceably disposed;

7. That he is entitled to have the question of his sanity or insanity determined by a jury, and he therefore demands that an investigation of his mental condition be had before a jury selected and impaneled by this court for that purpose; that this court subpcna witnesses to appear before said jury, to the end that the truth may be established and the petitioner restored to his liberty.

—, Petitioner.

—, Attorney for Petitioner.

(Verification, Form No. 55, § 80, *ante*.)

Order fixing day for hearing petition for restoration to capacity: Use Form No. 28, § 26, *ante*.

Notice of petition for restoration, etc.: Use Form No. 235, § 317, *ante*.

Proof of Service: Use Form No. 12, § 9, *ante*.

Form No. 266.—Judgment of Restoration to Capacity.

[Title of Court and Matter.]

Whereas on the — day of —, A. D. 18—, a complaint was filed in this court alleging that one — was insane, and by reason thereof was dangerous to be at large, and such proceedings were had thereupon that said — was, on the — day of —, A. D. 18—, duly committed to an insane asylum; and whereas there has been heretofore filed in this court a petition praying that a judgment restoring said — to capacity be given and made herein, and alleging that said — is not now insane; and whereas such proceedings have been had herein that on the — day of —, A. D. 18—, a jury was duly impaneled to determine the sanity and capacity of said —; and whereas,

after hearing the evidence, said jury has returned a verdict herein to the effect that said — is now of sound mind, and is not now insane and is fully capable of caring for himself and his property;—

It is therefore ordered, adjudged, and decreed that the said — be and he is hereby restored to capacity.

Dated —, 18—. —, Judge of the — Court.

ARTICLE III.

SPENDTHRIFTS AND DRUNKARDS.

§ 532. Spendthrifts.

§ 533. Drunkards.

§ 532. **Spendthrifts.**—The Oregon statutes contain the following sections relative to spendthrifts, and there are no corresponding sections in the laws of the other Pacific states and territories:—

“When any person, by excessive drinking, gaming, idleness, or debauchery of any kind, shall so spend, waste, or lessen his estate as to expose himself or his family to want or suffering, or the county to charge and expense, for the support of himself and family, the county court for such county of which such spendthrift is a resident or an inhabitant shall present a complaint to the county judge setting forth the facts and circumstances of the case, and praying to have a guardian appointed for him.” Hill’s Laws, sec. 2891.

“The county judge shall cause notice to be given to such supposed spendthrift of the time and place appointed for hearing the case, not less than ten days before the time so appointed; and if, after a full hearing, it shall appear to the judge that the person complained of comes within the description contained in the preceding section, he shall appoint a guardian of his person and estate, with the powers and duties hereinafter specified.” Hill’s Laws, sec. 2892.

“After the order of notice has been issued, the complainants shall cause a copy of the complaint with the order of notice to be filed in the office of the county clerk for the county, and if a guardian shall be appointed on such application, all contracts,

excepting for necessities, and all gifts, sales, or transfers of real or personal estate made by such spendthrift, after such filing of the complaint in the county clerk's office, and before the termination of the guardianship, shall be null and void." Hill's Laws, sec. 2893.

"When a guardian shall be appointed for an insane person or spendthrift, the judge shall make an allowance to be paid by the guardian for all reasonable expenses incurred by the ward in defending himself against the complaint." Hill's Laws, sec. 2894.

"Every guardian so appointed for a spendthrift shall have the care and custody of the person of the ward, and the management of all his estate, until the guardian shall be legally discharged; and he shall give bond to the state of Oregon in like manner and with like condition as is before directed with respect to the guardian of an insane person." Hill's Laws, sec. 2895.

"The word 'spendthrift' is intended to include any one who is liable to be put under guardianship on account of excessive drinking, gaming, idleness, or debauchery, and these words shall be so construed in all the provisions relating to guardians and wards contained in this or any other statute." Hill's Laws, sec. 2911.

§ 533. Complaint against Drunkards. — "Any person may make complaint of any person addicted to the excessive use of intoxicating liquors, to the probate judge in the county wherein such person so addicted resides, that the person complained of is an habitual drunkard, and that in consequence thereof such person is squandering his or her earnings or property, or that he or she neglects his or her business, or that such person abuses or maltreats his or her family, which complaint must be verified by the oath of the complainant to the effect that the same is true." Wash. Gen. Stats., sec. 2522.
Person may be adjudged habitual drunkard.

"Any person addicted to the use of intoxicating liquors may, upon complaint thereof, or upon certificate of a justice of the peace, as hereinafter provided, be adjudged an habitual drunkard." Wash. Gen. Stats., sec. 2523.

Proceedings relative to habitual drunkards.

"Either the father, husband, mother, wife, son, or daughter of any person addicted to the excessive use of intoxicating liquors, or any person in the interest of the relative aggrieved, or of the general public, may make complaint to the probate judge of the county wherein such person so addicted resides, that the person complained of is an habitual drunkard, and that in consequence thereof such person is squandering his earnings or property, or that he neglects his business, or that he abuses or maltreats his family, which complaint must be verified by the oath of the complainant, to the effect that the same is true. And every justice of the peace in whose court any person shall have been convicted twice on a charge of being drunk, or drunk and disorderly, shall certify to the probate judge of the county in which he resides that said person has thus twice been convicted." Wash. Gen. Stats., sec. 2524.

Form No. 267.— Complaint against Habitual Drunkard.

[Title of Court.]

—, Plaintiff, }
 v. }
 —, Defendant. }

The plaintiff, —, complaining of the defendant, —, alleges as follows:—

1. That plaintiff is the father (or other person interested) of —; that said —, defendant herein, is an habitual drunkard, and is addicted to the excessive use of intoxicating liquors;

2. That in consequence thereof said defendant is squandering his earnings and property in riotous living, and constantly neglects his ordinary business, and is entirely unable and unfitted to attend to the same;

3. That by reason of such drunkenness said defendant maltreats and abuses his family, assaults his wife and children without cause, calls them vile and offensive names and epithets, and uses vulgar and filthy language in their presence (state particular cases of such abuse, etc.);—

Wherefore plaintiff prays that a judgment of this court may

be given, made, and entered herein declaring said defendant to be an habitual drunkard. —, Plaintiff.

—, Attorney for Plaintiff.

(Verification as in Form No. 55, § 80, *ante*.)

NOTE. — The summons to be served on defendant is in form the same as is used in civil actions generally.

The answer of the defendant will consist of specific denials as in civil cases generally.

The judgment will be in the form of a judgment in civil cases generally.

Courts to declare persons habitual drunkards.

“Upon filing of the complaint, duly verified, the probate judge shall cause a copy thereof to be served upon the accused forthwith, and shall summon him to appear and answer, giving at least ten days’ notice; and if upon the hearing of the evidence the allegations of the complaint are sustained, or upon filing a certificate of a justice of the peace, as above provided, such judge shall, in open court, declare the accused to be an habitual drunkard, and shall cause the proceeding to be entered in full upon the records of the court.” Wash. Gen. Stats., sec. 2525.

Record declaring one habitual drunkard may be vacated, how.

“Any person so declared to be an habitual drunkard may, at any time after the expiration of two years from the time he was declared to be such, by petition addressed to the judge of the court in which he was so adjudged, have a hearing in such court, upon a day which shall be by such court set, which day shall not be more than ten days after the filing of such petition in such court, which petition may contain a statement of facts tending to show the improved condition and habits of such petitioner, and to establish his character for sobriety, and a prayer that the order on record so declaring him to be such habitual drunkard be vacated, and he be released from the effects thereof; which petition shall be duly verified by the petitioner. And if upon the hearing of such petition, and the evidence in support thereof, it appear to the judge that such petitioner is entitled to have such record vacated and be so released, then he shall make an order so declaring that such record be vacated and annulled, and that the petitioner be thereafter released from the effects thereof.” Wash. Gen. Stats., sec. 2530.

Form No. 268. — Petition to Set Aside Record Declaring an Habitual Drunkard.

(Title of court and cause as in last form.)

The petition of — respectfully represents to this honorable court as follows: —

1. That heretofore, to wit, on the — day of —, 18—, petitioner was, in the above-entitled cause, declared to be an habitual drunkard, by the judgment of this court duly given, made, and entered herein;

2. That two years have fully elapsed since said date;

3. That petitioner has fully reformed in that respect, and is no longer an habitual drunkard, nor does he now use intoxicating liquor in any form as a beverage (or state any other facts showing reformation and the improved condition and habits of petitioner); —

Wherefore petitioner prays that the judgment and order of this court heretofore given, made, and entered herein declaring and adjudging this petitioner to be an habitual drunkard be vacated, and that petitioner be released from the effects thereof.

—, Petitioner.

—, Attorney for petitioner.

Dated —, 18—.

To Hon. —, Judge of the Above-named Court.

(Verification as in Form No. 55, § 80, *ante*.)

“If information in writing be given to the court or judge of any county that any person in its county is so addicted to habitual drunkenness as to be incapable of managing his affairs, and praying that an inquiry thereinto be had, the court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic, or person of unsound mind; and if a guardian is appointed on such proceedings, he shall have the same powers and be subject to the same control as the guardian mentioned in this act.” Wyo. Laws 1890-91, p. 309, sec. 14.

ARTICLE IV.

POWERS AND DUTIES OF GUARDIANS.

- § 534. Guardian to pay debts of ward out of ward's estate.
- § 535. To recover debts due ward and to represent him.
- § 536. To manage his estate and to maintain ward.
- § 537. Maintenance, etc., how enforced.
- § 538. Guardian may assent to partition of real estate.
- § 539. To return inventory of estate of ward, etc.
- § 540. Accounts and settlements.
- § 541. Accounts of joint guardians.
- § 542. Expenses and compensation.

§ 534. [1768.] Guardian to Pay Debts of Ward out of Ward's Estate.—Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward out of his personal estate and the income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided in this title for the sale of real estate of decedents.

Arizona.—Same. Rev. Stats., sec. 1341.

Idaho.—Same. Rev. Stats., sec. 5788.

Montana.—Same. Comp. Stats., p. 366, sec. 367.

Nevada.—Same. Gen. Stats., sec. 563.

Oregon.—“Every guardian appointed under the provisions of this title shall pay all just debts due from his ward out of his personal estate, if sufficient; and if not, out of his real estate, upon obtaining a license for the sale thereof, as provided by law.” Hill's Laws, sec. 2896.

Utah.—Same as California. Comp. Laws, sec. 4322.

Washington.—See Code Proc., sec. 1163, under § 545, *ante*.

Wyoming.—Same as California. Laws 1890-91, p. 309, sec. 1.

Powers and Duties of Guardian: See §§ 536, 545, *post*, and notes; also § 573, *post*.

It is not necessary that claims they are paid by the guardian: *Racouillat v. Requena*, 36 Cal. 651. against the ward be verified or approved by the probate judge before

§ 535. [1769.] Guardian to Recover Debts Due his Ward and Represent Him.—Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the court, compound for the same and give discharges to the debtor, on receiving a fair and just dividend of his estate and effects;

and he must appear for and represent his ward in all legal suits and proceedings, unless another person be appointed for that purpose.

Arizona. — Same. Rev. Stats., sec. 1342.

Idaho. — Same. Rev. Stats., sec. 5789.

Montana. — Same. Comp. Stats., p. 367, sec. 368.

Nevada. — Same. Gen. Stats., sec. 564.

Oregon. — Same. Hill's Laws, sec. 2896.

Utah. — Same. Comp. Laws, sec. 4323.

Washington. — "Guardians, by virtue of their office, as such, shall be allowed in all cases to prosecute and defend for their wards." Code Proc., sec. 1135.

Wyoming. — Same as California, except that after "court" the words "or judge" are inserted. Laws 1890-91, p. 309, sec. 2.

See § 537, *post*.

The law confers no power on the county court to authorize guardians to mortgage the realty of their wards: *Trutch v. Bunnell*, 11 Or. 58.

Where guardians act with judicial authority, they bind their wards; and if the record of the probate court shows that the matter considered was within its jurisdiction, and that all necessary parties were before it, the action of the court, however irregular, is proof against collateral attack: *Brazee v. Schofield*, 2 Wash. Ter. 209.

bate court shows that the matter considered was within its jurisdiction, and that all necessary parties were before it, the action of the court, however irregular, is proof against collateral attack: *Brazee v. Schofield*, 2 Wash. Ter. 209.

§ 536. [1770.] Guardian to Manage his Estate, Maintain Ward, and Sell Real Estate. — Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining an order of the court therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

Arizona. — Same. Rev. Stats., sec. 1343.

Idaho. — Same. Rev. Stats., sec. 5790.

Montana. — Same. Comp. Stats., p. 366, sec. 369.

Nevada. — Same. Gen. Stats., sec. 565.

Oregon. — "The guardian shall also manage the estate of his ward frugally and without waste, and apply the income and profits thereof, so far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if the income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining a license therefor, as provided by law, and shall apply the proceeds of such sale, so far as may be necessary, for the maintenance and support of the ward and

his family; or the guardian may, upon authority granted therefor by the proper county court, mortgage said real estate for such amount as may be necessary for the maintenance and support of the ward and his family, or the care of said property, and shall apply the proceeds from the same to those purposes." Laws 1891, p. 36, amending Hill's Laws, sec. 2897.

Utah. — Same as California section (§ 549), *supra*. Comp. Laws, sec. 4324.

Wyoming. — Same as California, except that in lieu of the word "therefor" the words "or judge thereof" are inserted. Laws 1890-91, p. 309, sec. 3.

Sale by Guardian: See §§ 543-557, *post*.

Where a guardian has received money due his wards, which he has kept and used for his own purposes, and rendered no accounting for many years, until cited to appear and account on the petition of his wards, he is properly chargeable with interest upon the money received, compounded annually: *Guardianship of Eschrich*, 85 Cal. 98.

Guardian may employ agent to carry on the business of the guardianship: *Racouillat v. Requena*, 36 Cal. 651.

If a guardian loans the ward's funds without security, he is liable for any loss that may occur: *In re Post*, 57 Cal. 273.

Where letters of guardianship have been ordered to issue, but the guardian had not qualified, her act leasing the property of her ward was held to be valid: *Whyler v. Van Tiger*, Cal. Sup. Ct., Aug. 31, 1887 (No. 11931), not reported.

A lease which recites that it is made by a tenant in common in her own right and as guardian of her co-tenant, is valid, although executed by her individually only: *Whyler v. Van Tiger*, Cal. Sup. Ct., Aug. 31, 1887 (No. 11931), not reported.

A probate court has no jurisdiction of a proceeding to compel a guardian to advance out of the estate of his ward the necessary sums for his support, or to refund money advanced by the guardian of the person of the ward, or others, for that purpose: *Swift v. Swift*, 40 Cal. 456.

The statute of this state relative to guardians and the manner of disposing of the estate left to wards only applies when there is no direction by will as to such disposition: *Norris v. Harris*, 15 Cal. 226.

Where the same persons were named in the will as executors and guardians of the residuary legatee, and the will, in a clause giving plaintiff a monthly allowance during her life, directed the "executors" to expend such further sums for her care and comfort as they should deem necessary, the guardians, after their discharge as executors, have power to increase the allowance: *Elmer v. Gray*, 73 Cal. 283.

The county court, as a court of probate, is authorized to order the mortgaging of a minor's realty: *Trutch v. Bunnell*, 5 Or. 504; but in the same case, on another hearing, the contrary is held: *Trutch v. Bunnell*, 11 Or. 58.

§ 537. [1771.] Maintenance, Support, and Education of Ward, how Enforced. — When a guardian has advanced, for the necessary maintenance, support, or education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements. Whenever a guardian fails, neglects, or refuses to furnish suitable and necessary maintenance, support, or education for his

ward, the court may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support, or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.

Arizona. — Same. Rev. Stats., sec. 1344.

Idaho. — Same. Rev. Stats., sec. 5791.

Montana. — Same. Comp. Stats., p. 367, sec. 370.

Utah. — Same. Comp. Laws, sec. 4325.

Washington. — See § 540, *ante*.

Wyoming. — Same, except that the words "or judge" are inserted after the word "court" wherever it appears. Laws 1890-91, p. 310, sec. 4.

Husband is liable for support of insane wife, notwithstanding the fact that she has an estate: *In re Meyer*, Myr. Prob. 178.

Items in a guardian's account for payment of board of his wards while living with their elder brother, many years before the presentation of the account, are properly disallowed, where it appears that the brother made no demand for such payment, and did not claim that he was entitled to compensation for their keeping, and there

is no evidence that any amount was agreed to be paid him, or as to what their keeping was worth, or whether it was worth anything beyond their services; it further appearing that the guardian, without demand or claim against his wards, hunted up the brother and proposed to settle for the board, and voluntarily gave his note therefor, when cited to account upon petition of his wards ten years after his appointment: *In re Eschrich*, 85 Cal. 98.

§ 538. [1772.] May Assent to a Partition of Real Estate. — The guardian may join in and assent to a partition of the real estate of the ward, wherever such assent may be given by any person.

Arizona. — Same. Rev. Stats., sec. 1345.

Idaho. — Same. Rev. Stats., sec. 5792.

Montana. — Same. Comp. Stats., p. 367, sec. 371.

Nevada. — Same, except that all after "ward" is omitted, and the following substituted: "In the cases and in the manner provided by law." Gen. Stats., sec. 566.

Utah. — Same. Comp. Laws, sec. 4326.

Washington. — Provides that guardian may join in and assent under the direction of the court. Code Proc., sec. 1150.

Wyoming. — Same, with this clause added, viz.: "Interested in the real estate." Laws 1890-91, p. 310, sec. 5.

A guardian appointed to defend infants in a suit for partition cannot consent to a foreclosure of all the

claims of the infants and the quieting of plaintiff's title: *Waterman v. Lawrence*, 19 Cal. 217.

§ 539. [1773.] Guardian to Return Inventory of Estate of Ward, etc. — Every guardian must return to the court an inventory of the estate of his ward within three months after his appointment, and annually thereafter. When the value of the estate exceeds the sum of one hundred thousand dollars, semi-annual returns must be made to the court. The court may, upon application made for that purpose by any person, compel the guardian to render an account to the court of the estate of his ward. The inventories and accounts so to be returned or rendered must be sworn to by the guardian. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn, and acting in the manner provided for regulating the settlement of the estates of decedents. Such inventory, with the appraisement of the property therein described, must be recorded by the clerk of the court in a proper book kept in his office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return.

Arizona. — Same. Rev. Stats., sec. 1346.

Idaho. — Same, except provision as to semi-annual returns omitted. Rev. Stats., sec. 5793.

Montana. — Same, except semi-annual returns are to be made when estate exceeds twenty thousand dollars. Comp. Stats., p. 367, sec. 372.

Nevada. — Same, except that "and at such other times as the probate court may order" is substituted for "and annually thereafter." The provisions in reference to semi-annual returns and relating to rendering an account are omitted. The following is added: "If there be no estate, he shall return the fact under oath." Otherwise same. Gen. Stats., sec. 567.

Oregon. — See Hill's Laws, sec. 2884, under § 522, *supra*. In relation to appraisement, same as California. Hill's Laws, sec. 2898.

Utah. — Same as California, except that "twenty" is substituted for "one hundred." Comp. Laws, sec. 4327.

Washington. — See § 537, *ante*.

"Within forty days after his appointment, such guardian shall make out and file in the office of the clerk of the superior court by which he was appointed a just and true inventory of the real and personal estate of his ward, stating the income and profits thereof, and the debts, credits, and effects, as the same shall have come to his knowledge. And if, after having filed such

inventory, it shall be found that there is other property belonging to said estate, it shall be the duty of such guardian to make out and file an additional inventory, containing a just and full account of the same, from time to time, as the same may be discovered." Code Proc., sec. 1160.

"All such inventories shall be made in the presence of and attested by two credible witnesses in the neighborhood, and shall be verified by the oath of the guardian." Code Proc., sec. 1161.

The last two sections of Washington Code of Procedure, *supra*, apply only to estates of idiots and insane persons.

Wyoming.—Same as California, except that to the end of first sentence these words are added, viz., "account therefor," and the second sentence is omitted. After the word "court," in the third sentence, the words "or judge" are inserted. Laws 1890-91, p. 310, sec. 6.

Appraisers may be Appointed by the Judge at Chambers: See Cal. Code Civ. Proc., sec. 166; also § 1, *ante*.

Moneys received by guardian in a foreign jurisdiction, and transferred here, must be accounted for here, unless it is shown to have actually been accounted for in such foreign jurisdiction: *In re Secchi*, Myr. Prob. 225.

The county court has exclusive jurisdiction in the first instance to direct and control the conduct and to settle accounts of executors, adminis-

trators, and guardians, and this includes the power to inquire into a case of *devastavit*, and to charge the delinquent with the amount thereof: *Steele v. Holladay*, 20 Or. 70.

In exceptional cases accounts may be verified by persons other than the guardian if the latter also swears he believes the statements to be true: *Racouillat v. Requena*, 36 Cal. 651.

§ 540. [1774.] Settlements of Guardians.—The guardian must, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his account to the court for settlement and allowance.

Arizona.—Same. Rev. Stats., sec. 1347.

Idaho.—Same. Rev. Stats., sec. 5794.

Montana.—Same. Comp. Stats., p. 367, sec. 373.

Nevada.—Same, with the following added: "All the laws relative to the accounts of executors and administrators shall govern in regard to the accounts of a guardian, so far as they can be made applicable." Gen. Stats., sec. 583.

Wyoming.—Same as California. Laws 1890-91, p. 310, sec. 7.

Oregon.—See Hill's Laws, sec. 2884, under § 537, *ante*.

Utah.—Same. Comp. Laws, sec. 4328.

Washington.—"Superior courts shall have power in their respective counties, with or without previous complaint, by an order duly made and served, to oblige all guardians of minors from time to time to render their respective accounts, upon oath, touching their guardianship to said courts for adjustment." Code Proc., sec. 1137.

"It shall be the duty of every guardian of any minor . . . 3. To render, on oath, to the proper court, an account of his receipts and expenditures as such guardian, verified by [such] vouchers or proof, at least once in every two years, or whenever cited so to do." Code Proc., sec. 1138.

"Every such guardian, as often as required by the court appointing him, shall render a true and perfect account of his guardianship." Code Proc., sec. 1169.

Items for maintenance of ward should be disallowed when guardian had agreed that if appointed he would maintain and educate the ward, which agreement is embodied in the order appointing such guardian: *In re Barg*, Myr. Prob. 69.

Guardian must account for funds of ward received from foreign jurisdiction; there is no presumption that he has already accounted for it: *In re Secchi Minors*, Myr. Prob. 225.

Guardian loaning funds of ward, without sufficient security, imprudently, or depositing them in a bank known to be unsafe, will be responsible for loss: *In re Post*, Myr. Prob. 230; affirmed 57 Cal. 273.

The probate court has exclusive authority to settle the accounts of guardians either before or after letters are revoked. An action will not lie against a guardian's sureties until his account is settled: *Allen v. Tiffany*, 53 Cal. 16; *Graff v. Mesmer*, 52 Cal. 636.

The final account of a guardian is properly addressed to the court that has jurisdiction of the estate of the ward when presented by the guardian; but where the guardian dies before making a settlement, and long after the ward's majority, that court has no jurisdiction over the matter. The account can only be settled in a court of equity: *In re Allgier*, 65 Cal. 228; *Gilman v. Curtis*, 65 Cal. 572. See note to § 1637, *ante*.

Ward cannot maintain action against administrator of deceased guardian to recover money received by the guardian in trust, unless he first presents his claim to such administrator for allowance, or unless the trust fund has come into the possession of the administrator: *Gillespie v. Winn*, 65 Cal. 429.

The settlement of a guardian's annual account is only *prima facie* evidence of its correctness. Section 1637 of the California Code of Civil Procedure does not apply to a guardian's account. It is not made so by section 1789 of the same code: *In re Cardwell*, 55 Cal. 137.

The settlement and allowance of a final account of a guardian by the probate court is conclusive, not only against the guardian himself, but also against his sureties: *Brodrib v. Brodrib*, 56 Cal. 563. See also § 268, and note.

Where the guardian acts in good faith, and does not make any use or profit for himself out of the funds of his ward, he is chargeable with legal interest only if he negligently fails to keep his ward's money at interest: *In re Cardwell*, 55 Cal. 137. See *In re Post*, 57 Cal. 273, for liability of guardian for loss occasioned by negligently loaning ward's money.

The account of a guardian may in exceptional cases be verified by a person other than the guardian, if the latter also swears that he believes the former's statements are true: *Racoult v. Requena*, 36 Cal. 651.

In equity, sometimes one wrongfully intermeddling with the property of an infant is held as a guardian for the purpose of an accounting, but he acquires none of the rights of a guardian: *Aldrich v. Willis*, 55 Cal. 81.

A guardian who collects money of his ward, uses it, and does not account for it until forced to do so by the court many years later, is entitled to nothing more than the strict letter of the law allows him: *In re Eschrich*, 85 Cal. 98.

It is error, where decedent, during his lifetime, assigned a life insurance policy to a creditor, as security for a debt, the assignee being authorized by the assignment to recover and collect the money thereon, and the assignee, after the death of his insured assignor, collected the full amount of the policy, and paid it to the executor, less the amount due to himself, if the court refuses to allow the amount retained upon a settlement, because such creditor did not present a claim therefor to the executor: *In re Galland*, 92 Cal. 293.

Where an executor paid various sums as funeral expenses before knowledge of any limitation in testator's will, and the items of expense were duly presented, and were duly

approved and allowed by the executor and judge, and the items are not shown to be unreasonable, the court should allow to the executor, in his account, the whole amount paid, notwithstanding the fact that testator provided in his will that funeral expenses should not exceed a less sum: *In re Galland*, 92 Cal. 293.

If the heir or devisee seeks to charge the executor for negligence in not

taking or retaining possession of property of testator's estate, the burden of proof is upon complainant to establish the negligence and the value of the property lost to the estate: *Wheeler v. Bolton*, 92 Cal. 159.

Compound interest cannot be charged against executor unless he has been grossly negligent of the property, etc., of the estate of his testator: *Wheeler v. Bolton*, 92 Cal. 159.

§ 541. [1775.] Allowance of Accounts of Joint Guardians. — When an account is rendered by two or more joint guardians, the court may, in its discretion, allow the same upon the oath of any of them.

Arizona. — Same. Rev. Stats., sec. 1348.

Idaho. — Same. Rev. Stats., sec. 5795.

Montana. — Same. Comp. Stats., p. 368, sec. 374.

Nevada. — Same. Gen. Stats., sec. 597.

Oregon. — Same. Hill's Laws, sec. 2910.

Utah. — Same. Comp. Laws, sec. 4329.

Wyoming. — Same. Laws 1890-91, p. 311, sec. 8.

§ 542. [1776.] Expenses and Compensation of Guardians. — Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable.

Arizona. — Same. Rev. Stats., sec. 1349.

Idaho. — Same. Rev. Stats., sec. 5796.

Montana. — Same. Comp. Stats., p. 368, sec. 375.

Nevada. — Same. Gen. Stats., sec. 595.

Oregon. — Same. Hill's Laws, sec. 2909.

Utah. — Same. Comp. Laws, sec. 4330.

Washington. — Same. Code Proc., sec. 1151.

Wyoming. — Same. Laws 1890-91, p. 341, sec. 9.

A guardian of a minor, and not the minor, is primarily personally liable for the professional services of an attorney employed by the guardian in the performance of his duties: *Hunt v. Maldonado*, 89 Cal. 636.

If guardian pays an attorney's fee, and it is allowed by the court as a reasonable expenditure, and neces-

sary to protect ward's interest, it may be allowed from the ward's estate: *Hunt v. Maldonado*, 89 Cal. 636.

A guardian will not ordinarily be allowed for permanent improvements placed by him on a minor's property without authority: *Gerber v. Bauerline*, 17 Or. 674.

ARTICLE V.

THE SALE OF PROPERTY AND DISPOSITION OF THE PROCEEDS.

- § 543. May sell property in certain cases.
- § 544. Sale of real estate to be made upon order of court.
- § 545. Application of proceeds of sales.
- § 546. Investment of proceeds of sales.
- § 547. Order for sale, how obtained.
- § 548. Notice to next of kin, how given.
- § 549. Copy of order to be served, published, or consent filed.
- § 550. Hearing of application.
- § 551. Who may be examined on such hearing.
- § 552. Costs to be awarded to whom.
- § 553. Order of sale to specify what.
- § 554. Bond before selling.
- § 555. Proceedings for sales of property by guardians.
- § 556. Limit of order of sale.
- § 557. Conditions of sales of real estate — Bond and mortgage for deferred payments.
- § 558. Court may order the investment of money of the ward.

§ 543. [1777.] May Sell Property in Certain Cases. — When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to maintain and educate the ward when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

Arizona. — Same. Rev. Stats., sec. 1350.

Idaho. — Same. Rev. Stats., sec. 5737.

Montana. — Same. Comp. Stats., p. 368, sec. 376.

Nevada. — After the phrase "ward and his family," as follows: "or to educate his family, or to educate the ward when a minor," in lieu of "or to maintain and educate the ward when a minor"; otherwise same as California. Gen. Stats., sec. 568.

Oregon. — Same, except that the phrase "or to maintain and educate the ward when a minor" and the words "or personal estate" are omitted. Hill's Laws, sec. 3113.

Section 2899 of Hill's Laws provides for the sale of personal property.

Utah. — Same as California. Comp. Laws, sec. 4331.

Washington. — "Whenever necessary for the education, support, or payment of the just debts of any minor, or for the discharge of any liens on the real estate of such minor, or whenever the real estate of such minor is suffering unavoidable waste, or a better investment of the value thereof can be made, the court may, on the application of such guardian, order the same, or a part thereof, to be sold." Code Proc., sec. 1144.

Wyoming. — Same as California. Laws 1890-91, p. 311, sec. 1.

A guardian cannot sell any of the property of his ward without an order of court: *Kendall v. Miller*, 9 Cal. 591; *Schmidt v. Wieland*, 35 Cal. 343; *De la Montagnie v. Union I. Co.*, 42 Cal. 291.

A guardian of the person of a minor appointed by a foreign court, but not appointed guardian of the person and estate of said minor by the probate court of this state, has no authority to sell the lands of his ward situated in this state: *McNeil v. First Cong. Soc.*, 66 Cal. 109.

A foreign guardian has no authority to bind the real estate of his ward situate in this state, nor will his consent be sufficient to give the court jurisdiction to make an order of sale of said real estate: *Wilson v. Hastings*, 66 Cal. 243.

The guardian of a minor's estate has an authority coupled with an interest in the estate. The legislature cannot authorize another party

to dispose of the estate: *Lincoln v. Alexander*, 52 Cal. 482.

An act of the legislature authorizing a certain person as guardian of a minor to sell the real property of that minor will not authorize that person to make a sale of said property, unless said person has been appointed guardian of said minor by a court of competent jurisdiction: *Paty v. Smith*, 50 Cal. 153.

A sale made by a guardian, who is authorized by an act of the legislature to sell his ward's real estate subject to approval by the court, is valid: *Brenham v. Davidson*, 51 Cal. 352.

A petition to sell real estate is not a proceeding adverse to the ward, or to his relatives, but is in rem: *Gager v. Henry*, 5 Saw. 237; *Holmes v. Oregon etc. R. R. Co.*, 7 Saw. 380.

The proceedings for a sale of land by a guardian are in the nature of proceedings in rem: *Gager v. Henry*, 5 Saw. 237.

§ 544. [1778.] Sale of Real Estate to be Made upon Order of Court.—When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor.

Arizona.—Same. Rev. Stats., sec. 1351.

Idaho.—Same. Rev. Stats., sec. 5798.

Montana.—Same. Comp. Stats., p. 368, sec. 377.

Nevada.—Same. Gen. Stats., sec. 569.

Oregon.—The phrase "or in the improvement or security of any other real estate of the ward" is omitted; otherwise same. Hill's Laws, sec. 3114.

Utah.—Same, except that "property" is substituted for "stock." Comp. Laws, sec. 4332.

Washington.—"The court may, on the application of a guardian or any other person, said guardian having due written notice thereof, order and decree any change to be made in the investment of the estate of any ward that may to such court seem advantageous to such estate." Code Proc., sec. 1139.

See also last section. Code Proc., sec. 1144.

Wyoming.—Same, except that the words "or judge" are inserted after the word "court." Laws 1890-91, p. 311, sec. 2.

§ 545. [1779.] Application of Proceeds of Sales. —

If the estate is sold for the purposes mentioned in this article, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

Arizona. — Same. Rev. Stats., sec. 1352.

Idaho. — Same. Rev. Stats., sec. 5799.

Montana. — Same. Comp. Stats., p. 368, sec. 378.

Nevada. — Same. Gen. Stats., sec. 570.

"The probate court, on the application of a guardian, or of any person interested in the estate of any ward, after such notice to all persons interested therein as the probate judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and also any other money in his hands, in real estate, or in any other manner that shall be most to the interest of all concerned therein; and the said probate court may make such further orders and give such directions as the case may require for managing, investing, and disposing of the estate and effects in the hands of the guardian." Gen. Stats., sec. 584.

Oregon. — The following precedes the words "the guardian": "If the estate be sold for the maintenance of the ward and his family, as provided in section 3113." See § 556, *ante*. The remainder of the section is the same as California, except that the following is omitted: "Or the education of his children, or for the education of the ward when a minor." Hill's Laws, sec. 3115.

Utah. — Same. Comp. Laws, sec. 4333.

Washington. — See § 557, *ante*.

Wyoming. — Same as California. Laws 1890-91, p. 311, sec. 3.

§ 546. [1780.] Investment of Proceeds of Sales. —

If the estate is sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the court.

Arizona. — Same. Rev. Stats., sec. 1353.

Idaho. — Same. Rev. Stats., sec. 5800.

Montana. — Same. Comp. Stats., p. 368, sec. 379.

Nevada. — Same. Gen. Stats., sec. 571.

Oregon. — Same. Hill's Laws, sec. 3116.

Utah. — Same. Comp. Laws, sec. 4334.

Washington. — See § 557, *ante*.

Wyoming. — Same to and including the word "investment"; balance omitted, and these words are added after said word, "according to law." Laws 1890-91, p. 311, sec. 4.

§ 547. [1781.] **Order for Sale, how Obtained.**—To obtain an order for such sale, the guardian must present to the court in which he was appointed guardian a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale.

Arizona. — Same. Rev. Stats., sec. 1354.

Idaho. — Same. Rev. Stats., sec. 5801.

Montana. — Same. Comp. Stats. p. 368, sec. 380.

Nevada. — Same. Gen. Stats., sec. 572.

Oregon. — Same. Hill's Laws, sec. 3118.

Utah. — Same. Comp. Laws, sec. 4335.

Washington. — "Such application shall be by petition, verified by the oath of the guardian, and shall substantially set forth, — 1. The value and character of all personal estate belonging to such ward that has come to the knowledge or possession of such guardian. 2. The disposition made of such personal estate. 3. The amount and condition of the ward's personal estate, if any, dependent upon the settlement of any estate or the execution of any trust, 4. The annual value of the real estate of the ward. 5. The amount of rent received, and the application thereof. 6. The proposed manner of reinvesting the proceeds of the sale, if asked for that purpose. 7. Each item of indebtedness, or the amount and character of the lien, if the sale is prayed for the liquidation thereof. 8. The age of the ward, where and with whom residing. 9. All other facts connected with the estate and condition of the ward necessary to enable the court fully to understand the same. If there is no personal estate belonging to such ward in possession or expectancy, and none has come into the hands of such guardian, and no rents have been received, the fact shall be stated in the application." Code Proc., sec. 1145.

Wyoming. — Same as California, except that after the words "appointed guardian," the words "or judge thereof" are inserted. Laws 1890-91, p. 311, sec. 5.

A sale made under order of the probate court, by a guardian of infant devisees, under a will of the real estate devised to his wards, will not be effectual to confer a valid title, unless the probate court acquired jurisdiction of the proceeding for sale by the presentation of a proper petition by the guardian. The necessity or expediency of the sale must arise from one or more of these circumstances: 1. The existence of debts due from the ward, which cannot be paid out of his

personal estate and the income of his real estate; 2. The insufficiency of the income of the estate of the ward to maintain him and his family, or to educate his family, or to educate him when a minor; 3. That it would be for the benefit of the ward that his real estate, or a part thereof, should be sold, and the proceeds put out at interest or invested in some productive stock: *Fitch v. Miller*, 20 Cal. 352.

The petition must set forth the condition of the estate; but it is only

necessary to state the condition in such manner to enable the court to judge of the existence of one or more of the circumstances above specified: *Fitch v. Miller*, 20 Cal. 352.

The statute does not directly require, nor is it essential, that the value of the several items and parcels of property of which the estate consists should be stated: *Fitch v. Miller*, 20 Cal. 352.

Petition for sale of realty of ward, what must contain: *Sprague v. Stump*, 7 Saw. 280.

If judgment directing sale of ward's estate is founded upon a proper petition, it cannot be collaterally attacked: *Gager v. Henry*, 5 Saw. 287; *Walker v. Goldsmith*, 14 Or. 125.

Sales by guardians are authorized either when necessary to maintain or educate the ward, or when expedient for the purpose of a more profitable investment of the proceeds. If the sale is asked upon the ground of necessity, the petition must state the condition of the ward's whole estate, real and personal, as in the ordinary case of a sale by an executor or administrator; but if a sale of realty is asked on the ground of expediency for better investment of the proceeds, the petition need only state the condition of the estate to be sold, as in the case of sale of mining claims by an executor or administrator; and the omission of the petition to describe and show the condition of the ward's

personal estate will not affect the question of jurisdiction: *Smith v. Biscailuz*, 83 Cal. 344.

As affecting question of jurisdiction, no just distinction can be made between general and specific allegations of fact which in substance amount to the same thing, and tend to show that the land to be sold is unproductive and expensive: *Smith v. Biscailuz*, 83 Cal. 344.

It seems that general facts showing either the necessity or the expediency of a guardian's sale not set out in the petition may be supplied by proofs at the hearing and stated in the decree, under section 1537 of the Code of Civil Procedure, and that such general facts are merely those ultimate facts showing a contingency, as prescribed in sections 1777 and 1778 of the Code of Civil Procedure, as distinguished from the more explicit facts and circumstances showing the condition of the estate required by section 1781 to be stated in the petition; and that it must be presumed upon collateral attack, where such general facts are stated in the decree, that the court had all the necessary proofs before it. But the petition in this case being held sufficient to show jurisdiction, irrespective of section 1517 of the Code of Civil Procedure as amended in 1874, the question as to its construction and effect is not finally decided: *Smith v. Biscailuz*, 83 Cal. 344.

Form No. 269.—Petition of Guardian for Order of Sale.

[Title of Court and Guardianship.]

The petition of —, the guardian of the (person and) estate of —, a minor, respectfully shows to this honorable court:—

That the property of said minor consists of fifty shares of the capital stock of the Cable Railway Company of Florin, and also the following described real property, lots No. 25, 26, and 27 of Kerr's Addition to the town of Elk Grove, Sacramento County, California;

That said shares of stock are entirely unproductive; that the rents, issues, and profits of said real estate amount to but one hundred dollars per year, from which the amount of annual

taxes and the expense of insuring the improvements thereon and repairing the same, amounting in the aggregate to about \$—, are to be deducted;

That the residue of said income is wholly insufficient to maintain and educate said ward, and he has no other means of support and education;

That the real property of said minor is improved, being fenced by a picket fence, and a one-story cottage containing four rooms is situated thereon;

That said property has been appraised within one year last past;

That it is necessary that all the property of said ward should be sold;—

Wherefore petitioner prays that he be authorized to sell said property at public auction. —, Petitioner.

—, Attorney for Petitioner.

(Verification as in Form No. 55, § 80, *ante*.)

§ 548. [1782.] Notice to Next of Kin, how Given. —

If it appear to the court, or a judge thereof, from the petition, that it is necessary or would be beneficial to the ward that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary or would be beneficial to the ward, to sell the personal estate or some part of it, the court must order the sale to be made.

Arizona. — Same. Rev. Stats., sec. 1355.

Idaho. — Same. Rev. Stats., sec. 5802.

Montana. — Same. Comp. Stats., p. 368, sec. 381.

Nevada. — First sentence same. Second sentence as follows: "If it appear that it would be necessary, or would be beneficial to the ward, to sell the personal estate, or some part of it, the same proceedings shall thereupon be had in reference to notice of the application, and to ordering a sale, and making such sales as are provided in relation to sales of personal estate by executors or administrators." Gen. Stats., sec. 573.

Oregon. — Same as California, except last sentence, which is omitted. Hill's Laws, sec. 3119.

Utah. — Same as California, except that "ten" is substituted for "eight." Comp. Laws, sec. 4336.

Wyoming. — Same as California, except that the words "or judge" are inserted after the word "court" each time it appears after the first time. Laws 1890-91, p. 311, sec. 6.

Form No. 270. — Order to Show Cause on Petition for Order of Sale of Real or Real and Personal Property.

[Title of Court and Guardianship.]

It appearing from the petition of —, the guardian of the (person and) estate of —, a minor, that it is necessary (or would be beneficial) that the whole or some part of the real and personal estate of said minor should be sold, —

It is therefore ordered that the next of kin of said ward, —, to wit, —, —, and —, and all persons interested in said estate, appear before this court on the — day of —, A. D. 18—, to show cause, if any they can, why such sale should not be ordered. —, Judge of the — Court.

Dated —, 18—.

§ 549. [1783.] **Copy of Order to be Served, Published, or Consent Filed.** — A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least once a week for three successive weeks in a newspaper printed in the county, or if there be none printed in the county, then in such newspaper as may be specified by the court in the order. If written consent to making the order of sale is subscribed by all persons interested therein and the next of kin, notice need not be served or published.

Arizona. — Same, except "once a week for" is omitted. Rev. Stats., sec. 1356.

Idaho. — Same as Arizona. Rev. Stats., sec. 5803.

Montana. — Same as Arizona. Comp. Stats., p. 369, sec. 382.

Nevada. — Same as Arizona, except that the last sentence is omitted. Gen. Stats., sec. 574.

Oregon. — Same as California to the word "fourteen"; then as follows: "Ten days before the hearing of the petition, or shall be published at least

three successive weeks in such newspaper circulating in the county as the court shall specify in such order." Hill's Laws, sec. 8120.

Utah. — Same as California, except that "ten" is substituted for "fourteen"; and last part of the first sentence reads as follows: "Published at least three successive weeks in a newspaper having general circulation in the county, or in such newspaper as may be specified by the court in the order." Comp. Laws, sec. 4337.

Wyoming. — "A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least ten days before the hearing of the petition. If written consent to making the order of sale is subscribed by all persons interested therein and the next of kin, notice need not be served." Laws 1890-91, p. 312, sec. 7.

§ 550. [1784.] **Hearing of Application.** — The court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner, and of the next of kin, and of all other persons interested in the estate who oppose the application.

Arizona. — Same. Rev. Stats., sec. 1357.

Idaho. — Same. Rev. Stats., sec. 5804.

Montana. — Same. Comp. Stats., p. 369, sec. 383.

Nevada. — Same. Gen. Stats., sec. 575.

Utah. — Same. Comp. Laws, sec. 4338.

Wyoming. — Same, except that the words "or judge" are inserted after "court." Laws 1890-91, p. 312, sec. 8.

§ 551. [1785.] **Who may be Examined on Such Hearing.** — On the hearing, the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance and testimony may be issued by the court, in the same manner and with like effect as in other cases provided for in this title.

Arizona. — Same. Rev. Stats., sec. 1358.

Idaho. — Same. Rev. Stats., sec. 5805.

Montana. — Same. Comp. Stats., p. 369, sec. 384.

Nevada. — Same. Gen. Stats., sec. 576.

Utah. — Same. Comp. Laws, sec. 4339.

Wyoming. — Same, except that after "court" the words "or judge" are inserted. Laws 1890-91, p. 312, sec. 9.

§ 552. [1786.] **Costs to be Awarded to Whom.** — If any person appears and objects to the granting of any order

prayed for under the provisions of this article, and it appears to the court that either the petition or the objection thereto is sustained, the court may, in granting or refusing the order, award costs to the party prevailing, and enforce the payment thereof.

Arizona.—Same. Rev. Stats., sec. 1359.

Idaho.—Same. Rev. Stats., sec. 5806.

Montana.—Same. Comp. Stats., p. 369, sec. 385.

Nevada.—Same. Gen. Stats., sec. 577.

Oregon.—Same. Hill's Laws, sec. 3130.

Utah.—Same. Comp. Laws, sec. 4340.

Wyoming.—Same, except that after "court" the words "or judge" are inserted. Laws 1890-91, p. 312, sec. 10.

§ 553. [1787.] Order of Sale to Specify What.—If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part thereof, should be sold, the court may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale.

Arizona.—Same. Rev. Stats., sec. 1360.

Idaho.—Same. Rev. Stats., sec. 5807.

Montana.—Same. Comp. Stats., p. 369, sec. 386.

Nevada.—Same. Gen. Stats., sec. 578.

Oregon.— "No such license shall be granted for the sale of any real estate of a ward, excepting that of a minor, unless the county court of the county of which the ward is an inhabitant shall certify in writing its approbation of the proposed sale." Hill's Laws, sec. 3121.

Utah.—Same. Comp. Laws, sec. 4341.

Washington.— "If it shall appear to the court from such petition and from the hearing thereon that it is necessary, or would be beneficial to the ward, that such real estate, or some part of it, should be sold, the court may authorize the said guardian to sell the same at public sale, on the same terms and notice required for sales of real estate by executors and administrators." Code Proc., sec. 1146.

Wyoming.—Same, except that the words "or judge" are inserted after the word "court." Laws 1890-91, p. 312, sec. 11.

The order of sale must be in itself sufficient, and to make it so, the description of the land to be sold must be sufficiently definite and certain, without reference to any extraneous matter. Section 1544 (§ 140, *ante*) of the California Code of Civil Procedure

provides that the order of sale must describe the lands to be sold, and the record cannot be helped out by reference to a document not found in it. This question was fully considered by this court in the case of *Crosby v. Dowd*, 61 Cal. 557, and the reasoning

in that case appeals to this one; therefore, an order of sale of real estate belonging to minors, wherein the property was described as "twenty and one half acres of the rancho Golita, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara County, in a suit in partition wherein the guardian herein and mother of said minors was plaintiff and said minors were defendants," is insufficient, and a sale based thereon is void: *Hill v. Wall*, 66 Cal. 130.

In a proceeding to sell real estate, judgment of county court when acting as a court of probate cannot be

questioned except in the manner provided by statute: *Gager v. Henry*, 5 Saw. 237.

Upon a petition for sale, the court will determine if it is advisable to sell part, or the whole, or any, of the ward's estate: *Gager v. Henry*, 5 Saw. 237.

The judgment or order of sale need not state the conclusions of the court as to the advisability of the sale: *Gager v. Henry*, 5 Saw. 237.

A guardian's sale of real estate is a judicial sale, and cannot be questioned collaterally for an irregularity after such sale has been confirmed by the court: *Gager v. Henry*, 5 Saw. 237.

Form No. 271.—Order of Sale of Real or Real and Personal Property.

[Title of Court and Guardianship.]

The petition of —, guardian of the (person and) estate of —, a minor, for an order of sale of the property of said minor, coming on regularly to be heard, and it appearing that the order to show cause heretofore made and entered herein has been duly served upon the next of kin of said ward and all persons interested in said estate, and it appearing that said sale is necessary (or will be to the best interest of said ward),—

It is ordered, adjudged, and decreed that said —, guardian, be and he is hereby authorized to sell at public or private sale, as he shall deem to the best interest of his ward, the whole of the property of the estate of his said ward, to wit (here insert description).

The reasons why said sale is necessary (or beneficial) are as follows (here state the reasons with particularity).

Dated —, 18—. —, Judge of the — Court.

§ 554. [1788.] **Bond before Selling.**—Every guardian authorized to sell real estate must, before the sale, give bond to the ward, with sufficient surety, to be approved by the court, or a judge thereof, with condition to sell the same in the manner, and to account for the proceeds of the sale, as provided for in this chapter and chapter VII. of this title.

Arizona.—Same, except that the bond is to be given to the probate judge. Rev. Stats., sec. 1361.

Idaho. — Same as California. Rev. Stats., sec. 5808.

Montana. — Same as Arizona. Comp. Stats., p. 370, sec. 387.

Nevada. — Same as Arizona. Gen. Stats., sec. 579.

Oregon. — Same as Arizona. Hill's Laws, sec. 3122.

Utah. — Same. Comp. Laws, sec. 4342.

Wyoming. — Same, except that all after "provided for" is omitted, and in lieu thereof these words are inserted: "In other cases requiring bonds of guardians." Laws 1890-91, p. 312, sec. 12.

Where the order of the court did not require in terms that the guardian give a bond or take an oath of office, and neither is found, but the record does not show that they were not given, it will be presumed in support of a judgment adjudging a sale of the infant's property that the guardian qualified as such: *Brady v. Reese*, 51 Cal. 447. See *Goldsmith v. Gilleland*, 10 Saw. 606.

If the bond required upon a guardian's sale is referred to in the decree of sale as having been duly executed, it must be held to have been delivered to the judge, approved and

filed before the sale, though not marked filed until after the sale; and if the affidavit to the appraisement shows that it was sworn to before the confirmation of the sale, and it appears that the oaths of the appraisers appointed before the sale, and their certificate of appraisement bear the same date as their appointment, the appraisement must be held to have been filed before the confirmation, though not marked filed. A paper is filed when delivered to the proper officer, and indorsing it with the time of filing is no part of the filing: *Smith v. Biscailuz*, 83 Cal. 344.

§ 555. [1789.] Proceedings for Sales of Property by Guardians. — All the proceedings under petition of guardians for sales of property of their wards, giving notice and the hearing of such petitions, granting or refusing the order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale and application for confirmation thereof, notice and hearing of such application, making orders, rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as required by the provisions of this title concerning estates of decedents, unless otherwise specially provided in this chapter.

Sales, etc., enumerated in this section: See §§ 168 et seq., *ante*.

Accounts: See §§ 246 et seq., *ante*.

Arizona. — Same. Rev. Stats., sec. 1362.

Idaho. — Same. Rev. Stats., sec. 5809.

Montana. — Same. Comp. Stats., p. 370, sec. 388.

Nevada. — "He shall also give public notice of the time and place of sale, and shall proceed therein in like manner as prescribed in the case of a sale of land by an executor or administrator; the same proceedings shall be had as to the return of the sale and the confirmation thereof, and the order to execute a conveyance, as is prescribed in regard to sales of land made by executors

or administrators, and the confirmation shall have the same force and effect." Gen. Stats., sec. 580.

Oregon. — Same as Nevada to the words "the same"; then as follows: "And the evidence of giving such notice may be perpetuated in the same manner and with the same effect as is provided in the case of sales of real estate by executors and administrators." Hill's Laws, sec. 3124.

Utah. — Same. Comp. Laws, sec. 4343.

Washington. — "All the provisions of the chapter regulating sales by executors and administrators shall be applicable to sales made by guardians." Code Proc., sec. 1147.

"At the term of the court next after such sale, such guardian shall make report thereof to such court, and produce the proceeds of such sale, and the notes or obligations or other securities taken to secure the payment of the purchase-money." Code Proc., sec. 1148.

"The court, in confirming such sale and directing a conveyance, shall be governed by the law regulating the confirming of sales of real estate made by executors or administrators, and the making of conveyances on such sales." Code Proc., sec. 1149.

Wyoming. — Same as California. Laws 1890-91, p. 312, sec. 13.

Section 1637 of the Code of Civil Procedure does not apply to a guardian's account. It is not made applicable by section 1789 of the same code. *In re Cardwell*, 55 Cal. 137.

A sale of real estate of the ward by a guardian is void unless it appears that the same was held at public auction after due notice of the time and place thereof: *Hobart v. Upton*, 2 Saw. 302.

Sale is presumed to have been regular and according to law, though the record does not show the particular proceedings taken, except as to

the particulars mentioned in this section. These must appear of record; otherwise the sale is invalid and void: *Gager v. Henry*, 5 Saw. 237; *Hobart v. Upton*, 2 Saw. 302; *Walker v. Goldsmith*, 14 Saw. 125.

Probate sale of real estate is invalid if the notice is not properly given: *Gager v. Henry*, 5 Saw. 237.

A guardian's sale of real estate is a judicial sale, and cannot be questioned collaterally for an irregularity after such sale has been confirmed by the court: *Gager v. Henry*, 5 Saw. 237.

§ 556. [1790.] **Limit of Order of Sale.** — No order of sale granted in pursuance of this article continues in force more than one year after granting the same, without a sale being had.

Arizona. — Same. Rev. Stats., sec. 1363.

Idaho. — Same. Rev. Stats., sec. 5810.

Montana. — Same. Comp. Stats., p. 370, sec. 389.

Nevada. — Same. Gen. Stats., sec. 581.

Oregon. — Same. Hill's Laws, sec. 3125.

Utah. — Same. Comp. Laws, sec. 4344.

Wyoming. — Same, with this clause added: "And said order of sale may be recalled, at any time before sale, by the court." Laws 1890-91, p. 313, sec. 14.

§ 557. [1791.] Conditions of Sales of Real Estate — Bond and Mortgage for Deferred Payments.—All sales of real estate of wards must be for cash, or for part cash and part deferred payments, the credit in no case to exceed three years from date of sale, as, in the discretion of the court, is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers, in case of deferred payments, notes, and a mortgage on the real estate sold, with such additional security as the court deems necessary and sufficient to secure the prompt payment of the amounts so deferred, and the interest thereon.

Arizona. — Same. Rev. Stats., sec. 1364.

Idaho. — Same. Rev. Stats., sec. 5811.

Montana. — Same. Comp. Stats., p. 370, sec. 390.

Nevada. — Same, except that "bond" is substituted for "notes." Gen. Stats., sec. 598.

Utah. — Same. Comp. Laws, sec. 4345.

Washington. — See § 568, *ante*.

Wyoming. — Same, except that the words "or judge" are inserted after "court" each time it appears. Laws 1890-91, p. 313, sec. 15.

A guardian who is authorized by the legislature to sell his ward's real estate subject to approval of the court cannot accept anything but money in payment of the purchase price: *Brenham v. Davidson*, 51 Cal. 352.

§ 558. [1792.] Court may Order the Investment of Money of the Ward.—The court, on the application of a guardian, or any person interested in the estate of any ward, after such notice to persons interested therein as the court shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require.

Arizona. — Same. Rev. Stats., sec. 1365.

Idaho. — Same. Rev. Stats., sec. 5812.

Montana. — Same. Comp. Stats., p. 370, sec. 391.

Oregon. — Same. Hill's Laws, sec. 2899.

"In every case of the sale of real estate as provided in this chapter, the residue of the proceeds, if any remain upon the final settlement of accounts of the guardianship, shall be considered as real estate of the ward, and shall be

disposed of among the same persons and in the same manner as the real estate would have been if it had not been sold." Hill's Laws, sec. 3117.

"Such guardian shall also, before fixing on the time and place of sale, take and subscribe an oath before the county judge, or some other officer competent to administer the same, in substance as follows: That in disposing of the estate which he is licensed to sell, he will use his best judgment in fixing the time and place of sale, and that he will exert his utmost endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested therein." Hill's Laws, sec. 3123.

"When any minor, insane person, or spendthrift residing out of this state shall be put under guardianship in the state or county in which he resides, and shall have no guardian appointed in this state, the foreign guardian may file an authenticated copy of his appointment in the county court of any county in which there may be real estate of the ward; after which he may be licensed by the county court for the same county to sell the real estate of the ward in any county in the same manner and upon the same terms and conditions as are prescribed in this chapter in the case of a guardian appointed in this state, except in the particulars hereinafter mentioned." Hill's Laws, sec. 3126.

"Every foreign guardian so licensed to sell real estate shall take and subscribe the oath in the like case of guardians appointed in this state, and shall give notice of the time and place of sale, and conduct the same in the same manner prescribed for guardians appointed in this state, and may perpetuate the evidence of the notice in the same manner." Hill's Laws, sec. 3127.

"All the proceedings required to be had in any county court in this state respecting such sale by a foreign guardian shall be had in the court for the county in which the authenticated copy of his appointment is filed." Hill's Laws, sec. 3128.

"Upon every such sale by a foreign guardian, the proceeds of sale, or as much thereof as may remain upon the final settlement of the accounts of guardianship, shall be considered as real estate of the ward, and shall be disposed of among the same persons and in the same proportions as the real estate would have been according to the laws of this state if it had not been sold; and the foreign guardian shall, in every case, before making the sale, give bond to the county judge, with sufficient surety or sureties, with condition to account for and dispose of the same according to law." Hill's Laws, sec. 3129.

"In case of an action relating to any estate sold by a guardian under the provisions of this chapter, in which the ward or any person claiming under him shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings; *provided*, it shall appear, — 1. That the guardian was licensed to make the sale by a county court of competent jurisdiction; 2. That he gave a bond that was approved by the county judge; 3. That he took the oath prescribed in this chapter; 4. That he gave notice of the time and place of sale as prescribed by law; and 5. That the premises were sold accordingly at public auction, and are held by one who purchased them in good faith." Hill's Laws, sec. 3132.

"If, in relation to such sale, there should be any neglect or misconduct in the proceedings of the guardian, by which any person interested in the estate shall suffer damage, such aggrieved party may recover such damage in a suit

on the bond of such guardian, or otherwise as the case may require." Hill's Laws, sec. 3133.

"If the validity of any sale made by a guardian under this chapter shall be drawn in question by any person claiming adversely to the title of the ward, or claiming under any title that is not derived from or through the ward, the sale shall not be held void on account of any irregularity in the proceedings; *provided*, that the guardian was authorized to make sale by the proper county court, and that he did accordingly execute and acknowledge, in legal form, a deed for the conveyance of the premises." Hill's Laws, sec. 3134.

Wyoming.—Same as California, except that the words "or judge" are inserted after "court" each time it appears. Laws 1890-91, p. 313, sec. 16.

Utah.—Same as California. Comp. Laws, sec. 4346.

A guardian may invest moneys of his ward without an order of court, but he does so at his own peril. An order of investment procured from the court under the above section will protect him, even if misfortune follows the investment; but where he acts upon his own judgment, he is held to a more strict accountability: *In re Cardwell*, 55 Cal. 137.

ARTICLE VI.

NON-RESIDENT GUARDIANS AND WARDS.

§ 559. Guardians of non-resident persons.

§ 560. Powers and duties of guardians appointed.

§ 561. Such guardians to give bonds.

§ 562. To what guardianship shall extend.

§ 563. Removal of non-resident ward's property.

§ 564. Proceedings on such removal.

§ 565. Discharge of person in possession.

§ 559. [1793.] Guardians of Non-resident Persons.

—When a person liable to be put under guardianship, according to the provisions of this chapter, resides without this state and has estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to the superior court of any county in which there is any estate of such absent person, for the appointment of a guardian; and if, after notice given to all interested, in such manner as such court orders, by publication or otherwise, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed.

Arizona.—Same. Rev. Stats., sec. 1366.

Idaho.—Same. Rev. Stats., sec. 5813.

Montana.—Same. Comp. Stats., p. 371, sec. 392.

Nevada.—Same. Gen. Stats., sec. 591.

Oregon. — Same. Hill's Laws, sec. 2905.

Utah. — Same. Comp. Laws, sec. 4347.

Washington. — "When any minor or person of unsound mind residing out of the limits of this state has any real estate, goods, chattels, rights, credits, money, or effects in this state, the superior court having jurisdiction of the county in which such property, or any part thereof, is situate or may be shall, upon the application of the foreign guardian of such minor or person of unsound mind, appoint a trustee of such minor or person of unsound mind, to manage, collect, lease, and take care of said property." Gen. Stats., sec. 3072.

Wyoming. — Same as California, except that the word "superior" is omitted, and the words "or judge" are inserted after the word "court" each time it appears. Laws 1890-91, p. 313, sec. 1.

Corporations may be Guardians, etc.: See § 76, *ante*.

Appearance by Guardian: See § 332, *ante*.

Judge may Appoint Guardians, etc., at chambers: Code Civ. Proc., sec. 166; also § 1, *ante*.

Where a minor resides out of the state, the notice to be given of the application to be appointed guardian, the manner of giving it, the time for which it shall be given, subject perhaps to revision on appeal from the order of appointment, are discretionary matters with the judge. Third persons cannot question the validity of the order upon the ground that an insufficient notice was given of the hearing of the application for the appointment under the statute: *Gronfer v. Puymiro*, 19 Cal. 629.

§ 560. [1794.] Powers and Duties of Guardians Appointed under Preceding Section. — Every guardian, appointed under the preceding section, has the same powers and performs the same duties, with respect to the estate of the ward found within this state, and with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this chapter.

Arizona. — Same. Rev. Stats., sec. 1367.

Idaho. — Same. Rev. Stats., sec. 5814.

Montana. — Same. Comp. Stats., p. 371, sec. 393.

Nevada. — Same. Gen. Stats., sec. 592.

Oregon. — Same. Hill's Laws, sec. 2906.

Utah. — Same. Comp. Laws, sec. 4348.

Washington. — "The said trustee shall give bond, with surety to the satisfaction of the superior court, and shall take upon himself the management of the estate and property of such minor or person of unsound mind, situate in this state, and the collection of debts and other demands due such minor or person of unsound mind from persons residing or being in this state, and shall settle with the court, and be liable to suit or removal, or both, for neglect or misconduct in the performance of his duties, in like manner as is or may by law be provided in the case of guardians of minors." Gen. Stats., sec. 3074.

"Real estate belonging to minors and persons of unsound mind residing out of this state may be sold upon the application of the foreign guardian of such minor or person of unsound mind, to the superior court of the county in which such land is situated, upon the same terms as are or may be provided by law in case of the sale of real estate belonging to minors residing in this state." Gen. Stats., sec. 3071.

Wyoming. — Same as California. Laws 1890-91, p. 314, sec. 2.

§ 561. [1795.] Such Guardians to Give Bonds.

Every guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this state.

Arizona. — Same. Rev. Stats., sec. 1368.

Idaho. — Same. Rev. Stats., sec. 5815.

Montana. — Same. Comp. Stats., p. 371, sec. 394.

Nevada. — Same. Gen. Stats., sec. 593.

Oregon. — Same, except bond is to be given to the state. Hill's Laws, sec. 2907.

Utah. — Same. Comp. Laws, sec. 4349.

Wyoming. — Same as California. Laws 1890-91, p. 314, sec. 3.

§ 562. [1796.] To What Guardianship shall Extend. — The guardianship which is first lawfully granted of any person residing without this state extends to all the estate of the ward within the same, and excludes the jurisdiction of the court of every other county.

Arizona. — Same. Rev. Stats., sec. 1369.

Idaho. — Same. Rev. Stats., sec. 5816.

Montana. — Same. Comp. Stats., p. 371, sec. 395.

Nevada. — Same. Gen. Stats., sec. 594.

Oregon. — Same. Hill's Laws, sec. 2908.

Utah. — Same. Comp. Laws, sec. 4350.

Washington. — "The first appointment of a trustee, lawfully made, shall extend to all the property and effects of the minor in this state, and shall exclude the jurisdiction of the superior court of any other county." Gen. Stats., sec. 3073.

Wyoming. — Same as California. Laws 1890-91, p. 314, sec. 4.

§ 563. [1797.] Removal of Non-resident Ward's Property. — When the guardian and ward are both non-residents, and the ward is entitled to property in this state, which

may be removed to another state or foreign country without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state or foreign country of the residence of the ward, upon the application of the guardian to the superior court of the county in which the estate of the ward, or the principal part thereof, is situated.

Arizona. — Same. Rev. Stats., sec. 1370.

Idaho. — Same. Rev. Stats., sec. 5817.

Montana. — Same. Comp. Stats., p. 371, sec. 396.

Nevada. — "If a ward be a non-resident of this state, and entitled to property in this state, and have a guardian by authority of the laws of this state, or territory of the United States, or of a foreign country in which such ward resides, such property may be removed to such state or territory or foreign country in which such ward resides, upon the application of such guardian to the district court of this state in the county in which the property of such ward, or any part of such property, is situated." Stats. 1887, p. 58.

Utah. — Same as California. Comp. Laws, sec. 4351.

Washington. — "When the guardian and ward are both non-residents, and the ward is entitled to property in this state, which may be removed to another state or territory, without conflict to any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state or territory in which such ward may reside, upon the application of the guardian to the judge of the superior court of the county in which the estate of the ward, or the principal part thereof, may be, in the manner following: The guardian so applying must produce a transcript from the records of a court of competent jurisdiction, certified according to the laws of this state, showing his appointment as guardian of the ward in the state or territory in which he and the said ward reside; that he has qualified as such according to the laws thereof, and given bond, with sureties, for the performance of his trust; and must also give thirty days' notice to the resident executor, administrator, guardian, agent, or trustee, if there be such, of the applications; thereupon, if no objection be made; or if no good cause be shown to the contrary, the judge of the court shall make an order granting such guardian leave to remove the property of said ward to the state or territory in which he or she may reside; which order shall be full and complete authority to said guardian to sue for and receive the same, in his own name, for the use and benefit of said ward." Code Proc., sec. 1152.

Wyoming. — Same as California. Laws 1890-91, p. 314, sec. 5.

§ 564. [1798.] Proceedings on Such Removal.

The application must be made upon ten days' notice to the resident executor, administrator, or guardian, if there be such, and upon such application the non-resident guardian must produce and file a certificate, under the hand of the clerk and

seal of the court, from which his appointment was derived, showing:—

1. A transcript of the record of his appointment;
2. That he has entered upon the discharge of his duties;
3. That he is entitled, by the laws of the state of his appointment, to the possession of the estate of the ward, or must produce and file a certificate, under the hand and seal of the clerk of the court having jurisdiction in the country of his residence, of the estates of persons under guardianship, or of the highest court of such country, attested by a minister, consul, or vice-consul of the United States, resident in such country, that, by the laws of such country, the applicant is entitled to the custody of the estate of his ward, without the appointment of any court.

Upon such application, unless good cause to the contrary is shown, the court must make an order granting to such guardian leave to take and remove the property of his ward to the state or place of his residence, which is authority to him to sue for and receive the same in his own name, for the use and benefit of his ward.

Arizona. — Same. Rev. Stats., sec. 1371.

Idaho. — Same, except that the clause of subdivision 3 beginning with the words "or must produce" is omitted. Rev. Stats., sec. 5818.

Montana. — Same as California, except that the words "or judge" is inserted after the word "clerk" wherever it occurs, and the phrase "attested by a minister, consul, or vice-consul of the United States, resident in such country," is omitted, and the following sentence is added: "The said application shall also contain a description of the property of such ward, together with an estimate of its value." Comp. Stats., p. 371, sec. 397.

Nevada. — Same as California, except that after the words "of any court," in seventh line from the bottom of section, the following clause is inserted: "Upon such application, unless good cause to the contrary is shown, the court may, in its discretion, upon satisfactory proof that the interests of such ward are fully protected by sufficient security in the place of residence of such foreign guardian." Stats. 1887, p. 58.

Utah. — Same as California, except that in subdivision 3, after the words "laws of the state," the following is interpolated, "or foreign country." Comp. Laws, sec. 4352.

Washington. — See § 576, *ante*.

"The said trustees shall, under the order of the superior court, deliver up to the foreign guardian of such minor or person of unsound mind all the personal property, rights, and credits belonging to such minor or person of unsound mind; *provided*, that the superior court shall make no such order except

upon application of the foreign guardian, and sufficient proof of his appointment and qualification in accordance with the laws of the state or place of residence of such guardian." Gen. Stats., sec. 3075.

"The said trustee shall have no power to apply to the superior court for the sale of the real estate of such minor or person of unsound mind." Gen. Stats., sec. 3076.

"The said trustee, unless removed by the court, holds his appointment so long as the services of a trustee may be required, and shall receive such compensation for his services as may be stipulated between him and the foreign guardian; and in case no agreement has been made, then such compensation as is or may be by law provided for such guardians." Gen. Stats., sec. 3077.

"All moneys due such minor or person of unsound mind, in the hands of such trustee, shall be paid over to the foreign guardian so long as he shall remain such guardian, or in case of the decease of such minor or person of unsound mind, then to the administrator or legal representative of such minor or person of unsound mind." Gen. Stats., sec. 3078.

Wyoming. — Same as California. Laws 1890-91, p. 314, sec. 6.

§ 565. [1799.] Discharge of Person in Possession.

— Such order is a discharge of the executor, administrator, local guardian, or other person in whose possession the property may be at the time the order is made, on filing with the court the receipt therefor of the foreign guardian of such absent ward.

Arizona. — Same. Rev. Stats., sec. 1372.

Idaho. — Same. Rev. Stats., sec. 5819.

Montana. — Same. Comp. Stats., p. 373, sec. 398.

Nevada. — Same, with the following added: "Said receipt shall be recorded in the records of said court, and the court shall make an order discharging said executor, administrator, or local guardian from all further duties and responsibilities as such executor, administrator, or guardian, and that his letters of administration or guardianship are vacated, and that the sureties upon the bond of such executor, administrator, or guardian are released from any liability thereafter incurred." Stats. 1887, p. 58.

Utah. — Same as California. Comp. Laws, sec. 4353.

Wyoming. — Same as California. Laws 1890-91, p. 315, sec. 7.

ARTICLE VII.

GENERAL AND MISCELLANEOUS PROVISIONS.

- § 566. Examination of persons suspected of defrauding ward.
- § 567. Removal of guardian and surrender of estate.
- § 568. Guardianship, how terminated.
- § 569. New bond, when required.
- § 570. Guardian's bond to be filed.
- § 571. Limitation of actions on guardian's bond.

- § 572. Limitation of actions for recovery of property sold.
- § 573. More than one guardian of a person may be appointed.
- § 574. Order a decree of court.
- § 575. What provisions apply to guardians.

§ 566. [1800.] Examination of Persons Suspected of Defrauding Ward. — Upon complaint made to him by any guardian, ward, creditor, or other person interested in the estate or having a prospective interest therein as heir or otherwise, against any one suspected of having concealed, embezzled, or conveyed away, any of the money, goods, or effects, or an instrument in writing belonging to the ward or to his estate, the superior court, or a judge thereof, may cite such suspected person to appear before such court, and may examine and proceed with him on such charge in the manner provided in this title with respect to persons suspected of and charged with concealing or embezzling the effects of a decedent.

Arizona. — Same. Rev. Stats., sec. 1373.

Idaho. — Same. Rev. Stats., sec. 5820.

Montana. — Same. Comp. Stats., p. 373, sec. 399.

Nevada. — Same. Gen. Stats., sec. 590.

Oregon. — Same. Hill's Laws, sec. 2904.

Utah. — Same. Comp. Laws, sec. 4354.

Wyoming. — Same, except that the word "superior" is omitted, and the words "or judge" are inserted after the words "such court." Laws 1890-91, p. 315, sec. 1.

§ 567. [1801.] Removal and Resignation of Guardian and Surrender of Estate. — When a guardian, appointed either by the testator or a court, becomes insane, or otherwise incapable of discharging his trust, or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the superior court may, upon such notice to the guardian as the court may require, remove him and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto. Every guardian may resign, when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided, the court may appoint another in the place of the guardian who resigned or was removed.

Arizona. — Same. Rev. Stats., sec. 1374.

Idaho. — Same. Rev. Stats., sec. 5821.

Montana. — Same. Comp. Stats., p. 373, sec. 400.

Nevada. — The first sentence omits the following: "Or failed, for thirty days, to render an account or make a return." The second sentence adds the following: "And upon the death of any guardian," the court may appoint, etc. Otherwise section is the same. Gen. Stats., sec. 585.

Oregon. — "When any guardian, appointed either by a testator or by the county court, shall become insane or otherwise incapable of discharging his trust, or evidently unsuitable therefor, the county court, after notice to such guardian, and to all others interested, may remove him; and every guardian, upon his request, may be allowed to resign his trust when it shall appear to the county court proper to allow the same; and upon every such resignation or removal, and also upon the death of any guardian, the county court may appoint another in his stead." Hill's Laws, sec. 2900.

Utah. — Same as California. Comp. Laws, sec. 4355.

Washington. — "The court, in all cases, shall have power to remove guardians for good and sufficient reasons, which shall be entered of record, and to appoint others in their place or in the place of those who may die, who shall give bond and security for the faithful discharge of their duties as heretofore prescribed in this act; and when any guardian shall be removed or die, and a successor be appointed, the court shall have power to compel such guardian to deliver up to such successor all goods, chattels, moneys, title papers, or other effects belonging to such minor which may be in the possession of such guardian so removed, or of the executors or administrators of a deceased guardian, or of any other person or persons who have the same, and upon failure, to commit the party offending to prison until he, she, or they comply with the order of the court." Code Proc., sec. 1140.

"The several superior courts shall have the power to remove any such guardian at any time, for neglect of duty, mismanagement, or of disobedience to any lawful order, and appoint another in his place, whereupon such guardian shall immediately settle his account and render to his successor the estate and effects of his ward." Code Proc., sec. 1173.

NOTE. — The above section applies to guardians of estates of idiots and insane persons only.

Wyoming. — Same as California, except that the words "or judge" are inserted after the word "court" each time it appears, and the following is omitted: "or failed, for thirty days, to render an account or make a return"; and the word "superior" is also omitted. Laws 1890-91, p. 315, sec. 2.

The power to discharge a guardian may be exercised by the judge at chambers, and as the act of the court. And this power to finally discharge a guardian at chambers necessarily includes and implies the power to perform at chambers any act preliminary to this ultimate act of discharge: *Warder v. Elkins*, 38 Cal. 439. See also Cal. Code Civ. Proc., sec. 166.

A father who, as guardian of his minor children, receives an annual income of two thousand dollars, and

refuses through a period of several years to provide for their support and education, is not a suitable person to have the management of their estate, and should be removed from his guardianship: *In re Swift*, 47 Cal. 629.

Where a petition for the removal of a guardian presented no fact showing that the guardian had become incapable of discharging his trust concerning the estate of his wards, or unsuitable therefor, or that he had wasted or mismanaged the

same, or had failed to render an account or make a return, but simply contained facts in reference to the care and attention bestowed by the guardian on the persons of his wards, it was held to be error for the court to revoke the letters of guardianship in such case: *In re Rose*, 72 Cal. 577.

A newly appointed guardian is a necessary party on an appeal from an order removing a guardian: *In re Medbury*, 48 Cal. 83.

The record must show that the order of removal was based on some one of the grounds enumerated in the above section: *In re Raynor*, 74 Cal. 421.

§ 568. [1802.] Guardianship, how Terminated. —

The marriage of a minor ward terminates the guardianship of the person of such ward, but not the estate; and the guardian of an insane or other person may be discharged by the court when it appears, on the application of the ward or otherwise, that the guardianship is no longer necessary.

Termination of Guardianship of Insane: See § 546, *ante*.

Arizona. — Same, except that the words "of the person of such ward, but not the estate," are omitted. Rev. Stats., sec. 1375.

Idaho. — Same as Arizona. Rev. Stats., sec. 5822.

Montana. — Same as Arizona. Comp. Stats., p. 374, sec. 401.

Nevada. — Same as Arizona. Gen. Stats., sec. 586.

Oregon. — "The marriage of any female who is under guardianship as a minor shall operate as a discharge of her guardian." Provision relating to insane or other person same as California. Hill's Laws, sec. 2901.

Utah. — Same as California. Comp. Laws, sec. 4356.

Washington. — In case of the death of any such ward while under guardianship, the power of the guardian shall cease, and the estate descend and be disposed of in the same manner as if said ward had been of sound mind; the guardian shall immediately settle his accounts and deliver the estate and the effects of his ward to his legal representatives." Code Proc., sec. 1172.

Wyoming. — Same as California, except that the words "or judge" are inserted after the word "court." Laws 1890-91, p. 315, sec. 3.

§ 569. [1803.] **New Bond, when Required.** — The court may require a new bond to be given by a guardian whenever such court deems it necessary, and may discharge the existing sureties from further liability, after due notice given as such court may direct, when it shall appear that no injury can result therefrom to those interested in the estate.

Arizona. — Same. Rev. Stats., sec. 1376.

Idaho. — Same. Rev. Stats., sec. 5823.

Montana. — Same. Comp. Stats., p. 374, sec. 402.

Nevada. — Same. Gen. Stats., sec. 587.

"All the provisions of sections 80 to 89, inclusive, of the 'Act to regulate the settlement of the estates of deceased persons' are hereby declared to apply to guardians appointed in pursuance of this act, and to the bonds taken

or to be taken from such guardians, and to the sureties on such bonds." Gen. Stats., sec. 556.

Oregon. — Same as California to the word "after"; then as follows: "In the like case and upon the like terms as are prescribed with regard to executors or administrators." Hill's Laws, sec. 2902.

Utah. — Same as California. Comp. Laws, sec. 4357.

Washington. — "Sureties in the bond of any guardian may be discharged from liability therein, under the same rule and regulation prescribed for the discharge of the sureties in the bond of executors and administrators, and the provisions of this act regulating the same shall apply to guardians and guardians' bonds and sureties." Code Proc., sec. 1153.

Wyoming. — Same as California, except that the words "or judge" are inserted after the word "court" wherever the same occurs. Laws 1890-91, p. 315, sec. 14.

The court has the power to take a new bond and discharge the sureties on the bond of a guardian previously approved and filed, and the legal effect is, that the sureties on the bond first given are not responsible for any defaults of the guardian occurring subsequently to the date of the filing of the new bond: *Spencer v. Houghton*, 68 Cal. 82.

Prior to the adoption of section 1543 of the Civil Code, providing that the release of one of two or more joint

debtors does not extinguish the obligations of any of the others, the release of one of the sureties on the bond of a guardian, was a release of all; and if the contract of suretyship was entered into prior to the enactment of such section, and subsequently one of the sureties is released, all are released. The right of the co-sureties to be released under such contract is a vested right of which they could not be deprived by subsequent legislation: *Spencer v. Houghton*, 68 Cal. 82.

§ 570. [1804.] Guardian's Bond to be Filed. — Every bond given by a guardian must be filed and preserved in the office of the clerk of the superior court of the county; and in case of a breach of a condition thereof, may be prosecuted for the use and benefit of the ward, or of any person interested in the estate.

Arizona. — Same. Rev. Stats., sec. 1377.

Idaho. — Same. Rev. Stats., sec. 5824.

Montana. — Same. Comp. Stats., p. 374, sec. 403.

Nevada. — Same. Gen. Stats., sec. 588.

Utah. — Same. Comp. Laws, sec. 4358.

Washington. — "All the provisions of chapter 5 of title 12, relative to bonds given by executors and administrators, shall apply to bonds taken of guardians." Code Proc., sec. 1141.

Wyoming. — Same as California, except that the word "superior" is omitted. Laws 1890-91, p. 316, sec. 5.

§ 571. [1805.] Limitation of Actions on Guardian's Bond. — No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within

three years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed.

Arizona. — Same. Rev. Stats., sec. 1378.

Idaho. — Same. Rev. Stats., sec. 5825.

Montana. — Same. Comp. Stats., p. 374, sec. 404.

Nevada. — Same. Gen. Stats., sec. 589.

Oregon. — First part of section same, except phrase "or removal," which is omitted. The remainder of section provides that if at time of discharge the person is out of the state, the action may be commenced at any time within three years after his return to the state. Hill's Laws, sec. 2903.

Utah. — Same as California, except that "one" is substituted for "three" in the last clause. Comp. Laws, sec. 4359.

Wyoming. — Same as California, except that "five" is substituted for "three" wherever it occurs. Laws 1890-91, p. 316, sec. 6.

The court may make a final decree discharging a guardian and his sureties from all liabilities incurred or to be thereafter incurred, except as to liability to persons laboring under a legal disability. The rights of such persons are preserved until two (three now) years after their disability ceases, whether so expressed in the decree or not: *Racouillat v. Requena*, 36 Cal. 651.

§ 572. [1806.] Limitation of Actions for the Recovery of Property Sold. — No action for the recovery of any estate, sold by a guardian, can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.

Arizona. — Same. Rev. Stats., sec. 1379.

Idaho. — Same. Rev. Stats., sec. 5826.

Montana. — Same. Comp. Stats., p. 374, sec. 405.

Nevada. — Same. Gen. Stats., sec. 582.

Oregon. — Same, except as to time, which is five years. Hill's Laws, sec. 3131.

Utah. — Same as California, except that "one" is substituted for "three" in the last clause. Comp. Laws, sec. 4360.

Wyoming. — Same as California, except that the word "five" is substituted for the word "three" wherever the same occurs. Laws 1890-91, p. 316, sec. 7.

The above section only applies to sales by guardians appointed by the probate courts of this state: *McNeil v. First Cong. Soc.*, 66 Cal. 105.

§ 573. [1807.] More than One Guardian of a Person may be Appointed.—The court, in its discretion, whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as a sole guardian.

Arizona.—Same. Rev. Stats., sec. 1380.

Idaho.—Same. Rev. Stats., sec. 5827.

Montana.—Same. Comp. Stats., p. 374, sec. 406.

Nevada.—Same. Gen. Stats., sec. 596.

Utah.—Same. Comp. Laws, sec. 4361.

Wyoming.—Same, except that the words "or judge" are inserted after the word "court." Laws 1890-91, p. 316, sec. 8.

§ 574. [1808.] Order a Decree of Court.—Any order appointing a guardian must be entered as and become a decree of the court. The provisions of this title relative to the estates of decedent, so far as they relate to the practice in the superior court, apply to proceedings under this chapter.

Arizona.—Same. Rev. Stats., sec. 1381.

Idaho.—Same. Rev. Stats., sec. 5828.

Montana.—Same. Comp. Stats., p. 375, sec. 407.

Utah.—Same. Comp. Laws, sec. 4362.

Wyoming.—Same. Laws 1890-91, p. 316, sec. 9.

§ 575. [1809.] What Provisions Apply to Guardians.—The provisions of section 1057 are hereby declared to apply to guardians appointed by the court, and to the bonds taken or to be taken from such guardians, and to the sureties on such bonds.

Arizona.—Same. Rev. Stats., sec. 1382.

Idaho.—Same. Rev. Stats., sec. 5829.

Montana.—Same. Comp. Stats., p. 375, sec. 408.

Utah.—Same. Comp. Laws, sec. 4363.

Washington.—See § 583, *ante*.

Wyoming.—“All bonds required as provided for by this act may be approved by the clerk of the district court wherein the same are required to be filed.” Laws 1890-91, p. 317, sec. 1.

Sickness or absence of judge.

“Whenever any judge of the district court is absent from the state, sick or otherwise unable to attend to the duties of his office as by this act provided, from any cause, any other one of the district judges may, upon application at his residence, examine into all matters, make all orders, and direct the affairs of the administration of estates that are required to be performed by judges

in vacation, and shall have the same powers as the original judge therein would have." Laws 1890-91, p. 317, sec. 2.

Law not retrospective.

"All probate proceedings now pending in any court shall be carried on to final settlement and determination without change in form of procedure as to what has heretofore been done, and all such proceedings in such causes hereafter done shall be under and according to the existing law." Laws 1890-91, p. 317, sec. 3.

Definition.

"Wherever . . . the probate judge or probate court is mentioned, the same shall mean and refer to the district court, or judge thereof." Laws 1890-91, p. 317, sec. 4.

Clerk to act as commissioner when.

"Until a court commissioner is by law created, the duties of this act prescribed for such court commissioner shall be performed by the clerk of the district court." Laws 1890-91, p. 318, sec. 5.

CHAPTER XX.

APPEALS.

§ 576. Appeals.

§ 577. Appeals, when may be taken.

§ 578. Executors and administrators need not give bond.

§ 579. Acts of administrator not invalidated when.

§ 576. [57.] **Appeals.**—Appeals in probate proceedings shall be given preference in hearing in the supreme court, and be placed on the calendar in the order of their date of issue, next after cases in which the people of the state are parties. Cal. Stats. 1887, p. 82.

Montana.—“In all cases an appeal may be taken from any order, judgment, or decree of the probate courts to the district court.” Comp. Stats., p. 42, sec. 1932.

“Appeals from the probate court shall be brought to a hearing at the earliest period practicable. For the failure to prosecute an appeal or unnecessary delay in bringing it to a hearing, the district court may order the appeal to be dismissed.” Comp. Stats., p. 181, sec. 447.

Nevada.—“Appeals shall be cognizable at the next term of the district court which shall be holden after the expiration of twenty-four days after such appeal shall have been perfected.” Gen. Stats., sec. 2968.

“Upon such appeal being perfected, and upon the clerk of said court being paid the fees allowed him by law for the services herein required of him, he shall immediately transmit to the clerk of the district court, under his official seal, a transcript of the record, proceedings, and all papers relative to the cause appealed from.” Gen. Stats., sec. 2969.

“The court above may reverse or affirm, in whole or in part, the sentence or proceeding appealed from, and may make such decree or order thereon as the judge of the private court should have made, and shall remit the case to the court from whence it came for further proceedings, unless such reversal or affirmance be appealed from, as hereinafter provided.” Gen. Stats., sec. 2970.

“If, upon hearing an appeal in the district court, any question of fact shall occur that is proper for a jury to try, the court shall, upon application, cause it to be tried by a jury upon such issue of fact, to be formed under the direction of the court.” Gen. Stats., sec. 2971.

“If the decision be affirmed, the district court shall award costs, to be paid by the party appealing, either personally or out of the estate of the deceased, as he shall direct. If the decision be reversed, costs shall, in like manner, be awarded against the party maintaining the decision of the probate judge or

court, either personally or out of the estate of the deceased." Gen. Stats., sec. 2972.

"Such affirmance, or such reversal, shall be certified to the probate court or judge, whose decision was appealed from, by the district court, with the award of costs made by him. Such probate court or judge shall enforce the payment of the costs so awarded, in the same manner as if such award had been made by him." Gen. Stats., sec. 2973.

"Any person interested in, or affected by, and aggrieved by the decision of the district court, affirming, reversing, or modifying the decision, sentence, or order of the probate court or judge, may, in all cases where the amount involved exceeds one thousand dollars, exclusive of costs, appeal to the supreme court of this territory." Gen. Stats., sec. 2974.

"The appeal provided for in the preceding section may be taken within twenty days after the order, decree, or judgment is made and entered in the minutes of the court. It shall be made by filing with the clerk of the district court a notice, stating the appeal from the order, decree, or judgment, or some specific part thereof, and by executing an undertaking, or giving surety on such appeal in the same manner and to the same extent as upon other appeals to the supreme court from the district court." Gen. Stats., sec. 2975.

"If a party who has a right to appeal to the supreme court wishes a statement of the case to be annexed to the record, he shall prepare and file the same within five days after the entry of the order, judgment, or decree." Gen. Stats., sec. 2976.

"Upon an appeal from the district court, as hereinbefore provided, the appellate court may reverse, affirm, or modify the judgment, order, or decree appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and shall certify the same to the district court appealed from." Gen. Stats., sec. 2977.

Escheat.

"Any party who shall have appeared to any proceedings, as aforesaid, [escheats. — Ed.] and the attorney-general, in behalf of the territory, shall, respectively, have the same right to prosecute an appeal or writ of error, upon any judgment as aforesaid, as parties in other cases." Gen. Stats., sec. 2995.

§ 577. [963.] **Appeals, when may be Taken.** — An appeal may be taken to the supreme court, from a superior court, in the following cases: . . . 3. From a judgment or order granting, refusing, or revoking letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate; or against or in favor of the validity of a will, or revoking the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property; or settling an account of an executor, or administrator, or guardian, or refus-

ing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser setting apart the homestead.

Subdivisions 1 and 2 of the above section do not apply to probate cases: See *In re Calahan*, 60 Cal. 232; *In re Dean*, 62 Cal. 613.

For manner of taking appeals, see Cal. Code Civ. Proc., secs. 1402-1451.

Arizona. — "Any person who may consider himself aggrieved by any decision, order, decree, or judgment of the probate court shall have the right to appeal therefrom to the district court of the county upon complying with the provisions of this chapter." Rev. Stats., sec. 1298.

"He shall, within twenty days after such decision, order, judgment, or decree shall have been rendered, file with the clerk of the probate court a bond, with two or more good and sufficient sureties, payable to the territory of Arizona, and to be approved by the clerk, conditioned that the appellant shall prosecute said appeal to effect, and perform the decision, order, decree, or judgment which the district court shall make thereon, in case the cause shall be decided against him." Rev. Stats., sec. 1299.

Idaho. — Same as California. Rev. Stats., sec. 4831.

Montana. — "An appeal may be taken from a probate court to the district court of the district in which the probate court is held, in the following cases: 1. From an order or decree admitting a will to probate or refusing the same; 2. From an order setting apart property or making an allowance for the widow or children; 3. From an order granting letters testamentary or of administration, or appointing a guardian of an infant or of an insane person, or of a person incompetent to manage his property, or refusing to grant such letters or to make such appointment, or making such letters of appointment; 4. From an order directing the sale or conveyance of real property; 5. From an order or decree by which a debt, claim, legacy, or distributive share is allowed, or payment thereof directed, or by which such allowance or direction is refused; 6. From an order made on the settlement of an executor, administrator, or guardian." Comp. Stats., p. 181, sec. 445.

"The appeal shall be taken within thirty days after the order or decree appealed from is entered with the clerk." Comp. Stats., p. 181, sec. 446.

"In cases other than those provided for in section 445 [*supra*], any party feeling aggrieved by the judgment of the probate court in any civil action may appeal therefrom to the district court for the county in which said probate court is held, or to which it may be attached for judicial purposes. The party appealing shall be known as the appellant, and the adverse party as the respondent." Comp. Stats., p. 181, sec. 448.

"All appeals taken by virtue of the provisions of the last section shall be perfected within thirty days from the rendition of the judgment appealed from, and shall be tried *de novo* in said district court." Comp. Stats., p. 181, sec. 449.

"The appeal shall be taken by filing with the clerk of the court in which the judgment appealed from is entered, or with the judge of said court if

there be no clerk, a notice stating the appeal from the same, and serving a copy of such notice upon the adverse party or his attorney." Comp. Stats., p. 181, sec. 450.

"The party appealing shall file with the judge or clerk of said court, within five days from the filing of the notice of appeal, as provided in the last section, an undertaking in double the amount of the judgment appealed from, or if the judgment be for the recovery of specific personal property, in double the value of such property, with at least two sufficient sureties, and conditioned that the party appealing will pay any judgment that may be rendered against him in the district court, as well as all costs that may be awarded against him, and for the prosecution of such appeal with effect." Comp. Stats., p. 182, sec. 451.

"If the party appealing be the party in whose favor judgment was rendered, he shall likewise execute and file an undertaking as aforesaid, in a sum equal to double the amount of the costs in the case, conditioned to pay all costs that may be adjudged against him, and for the prosecution of such appeal with effect." Comp. Stats., p. 182, sec. 452.

"The undertaking provided for in the two preceding sections shall be accompanied by the affidavit of the sureties that they are residents of the county, and householders or freeholders thereof, and each worth the amount specified in the undertaking over and above their debts, liabilities, and property by law exempt from execution; but several sureties may state that they are worth less than the amount mentioned in the undertaking besides such exemptions, if the whole amount equals the amount of two sufficient sureties." Comp. Stats., p. 182, sec. 453.

"Within ten days after filing the notice of appeal and undertaking provided for in the preceding sections, and payment of fees therefor, the said judge or clerk of said court shall make a full and complete transcript from the docket of all proceedings had in said action, and transmit the same, together with the complaint, answers, motions, pleadings, and all other papers pertaining to or belonging to said cause, to the clerk of said district court." Comp. Stats., p. 182, sec. 454.

"If any execution shall have been issued upon a judgment appealed from, the judge or clerk of said court, upon receiving the notice and undertaking as hereinbefore provided, shall issue an order directing the officer having such execution in his possession, or charged with the execution of the same, to stay all proceedings thereunder. Such officer, upon the payment of his fees for services rendered on such execution, shall thereupon relinquish all property levied upon by him, and deliver the same, together with all money collected from sales or otherwise, to the judgment debtor." Comp. Stats., p. 182, sec. 455.

"If the party appealing to the district court, as provided in this act, shall fail to reduce or enlarge the judgment appealed from ten dollars or more, or revise the same in said district court, he shall not recover any of the costs of appeal." Comp. Stats., p. 183, sec. 456.

"That all appeals taken by virtue of this act shall be tried in the district court upon the papers in the cause as if the same had originally been instituted in said court, unless said court, upon such terms as may be just, allow

other papers to be filed therein, and both appellant and respondent shall have the benefit of objection taken in said probate court." Comp. Stats., p. 183, sec. 457.

"That the sheriffs of the different counties of this territory are charged with the execution of process issued from said probate court in like manner as provided for in cases in the district court, for which services they shall receive fees as provided by law." Comp. Stats., p. 183, sec. 458.

The above sections, from 445 to 458, inclusive, compose chapter 3 of title 40, Civil Code of Montana, relating to appeals from probate to district courts.

Nevada. — "If any person interested in or to be affected by, and who shall be aggrieved by, any order, allowance, sentence, decree, or denial of any probate court or judge, or any other act in his official capacity, may appeal therefrom to the district court of the judicial district in which said probate court is held." Gen. Stats., sec. 2966.

Oregon. — "The provisions of title 4 of chapter 6, relating to appeals, are intended to apply to judgments and decrees of the county court in all cases, but not to its decisions given or made in the transaction of county business. In the latter case, the decisions of the court shall only be reviewed upon the writ of review provided by this code." Hill's Laws, sec. 902.

Utah. — "And from the judgments of the probate courts, an appeal shall lie to the district court of the district embracing the county in which such probate court is held in such cases and in such manner as the supreme court of said territory may by general rules framed for that purpose specify and designate, and such appeal shall vacate the judgment appealed from, and the case shall be tried *de novo* in the appellate court. Appeals may be taken from . . . probate courts to the district court of their respective districts in cases where judgments have been heretofore rendered and remain unexecuted; but this provision shall not enlarge the time for taking an appeal beyond the periods now allowed by the existing laws of said territory for taking appeals." Extract from U. S. Rev. Stats., sec. 1907. See 1 Comp. Laws, 104.

Washington. — "Except as otherwise provided in this section, any party aggrieved may appeal to the supreme court from the superior courts in all actions and proceedings." The exceptions do not apply to probate proceedings. Code Proc., sec. 1402.

"In civil actions and proceedings, appeals shall be prosecuted within six months after the rendition of the decision, order, or judgment complained of." Code Proc., sec. 1403.

The following orders are appealable, viz.: Order dismissing a petition to have an administrator show cause why an allowed claim should not be paid: *In re McKinley*, 49 Cal. 152; an order setting apart a homestead: *In re Burns*, 54 Cal. 223; denying a contestant's motion for a new trial in the matter of a contest for the probate of a will: *In re Doyle*, 73 Cal. 564; settling an account: *In re Sanderson*, 74 Cal. 199; *In re Couts*, 87

Cal. 480; settling a final account and decreeing distribution: *Dean v. Superior Court*, 63 Cal. 473; decreeing a partial distribution: *In re Kelley*, 63 Cal. 106; but an executor who is a legatee cannot, in his capacity of executor, appeal from such decree: *In re Murrey*, 65 Cal. 287; directing or refusing to direct a conveyance of real estate by an executor or administrator under §§ 235 et seq., ante: *In re Corwin*, 61 Cal. 160; directing a resale of real

property: *In re Boland*, 55 Cal. 310; directing a sale of real estate: *In re Stutmeister*, 71 Cal. 322; authorizing administrator to mortgage realty: *In re McConnell*, 74 Cal. 217; directing the payment of an attorney for services rendered: *Stutmeister v. Superior Court*, 72 Cal. 487.

An appealable order cannot be reviewed on an appeal from a subsequent order: *In re Burns*, 54 Cal. 223.

An appeal from order admitting will to probate stays proceedings: *In re Cunningham*, Myr. Prob. 214.

Order appointing guardian of minor is appealable. The appellate court will not entertain jurisdiction of appeal from order refusing to revoke that order: *In re Get Young*, 90 Cal. 77.

Order denying a new trial is appealable, where an issue arises upon objections by the legatee to the appointment as executor, of one named in the will as such, and a trial is had resulting in a denial of her application: *In re Bauquier*, 88 Cal. 302.

Appeals can only be taken from such judgments or orders in probate proceedings as are mentioned in section 963 of the Code of Civil Procedure: *In re Moore*, 86 Cal. 58.

An interlocutory order settling the account of an administrator, but not discharging him from his trust, is not a final judgment, within the meaning of section 939 of the Code of Civil Procedure, although in the form of findings and decree; but such order is appealable, and brings up for review all the proceedings leading to it, and the evidence upon which it was based, though the appeal be not taken within sixty days after the signing and filing of the findings and decree: *In re Rose*, 80 Cal. 166.

The remedy is by appeal, if a decree for final distribution is erroneous as to the law or the facts; such error is not ground for relief in equity against the decree: *Daly v. Pennie*, 86 Cal. 553.

An order requiring one who has been appointed guardian of the estate of a minor, but who has never given bonds, to pay for the maintenance of the minor, when it is not shown that he has received any

property of the minor by virtue of his appointment, is erroneous; but the order is one from which an appeal may be taken; therefore a writ of prohibition will not lie to prevent the court from enforcing the order: *Murphy v. Superior Court*, 84 Cal. 592.

The following orders are not appealable, viz.: Order refusing to remove an administrator, etc.: *In re Montgomery*, 55 Cal. 210; *In re Keane*, 56 Cal. 407; *In re Moore*, 68 Cal. 394; refusing to set aside an order of distribution and settlement of accounts: *In re Lutz*, 67 Cal. 457; setting aside an order of distribution: *In re Dean*, 62 Cal. 613; *In re Calahan*, 60 Cal. 232; setting aside an order allowing an account: *In re Calahan*, 60 Cal. 232; *In re Dunne*, 53 Cal. 631; refusing to quash an execution: *Blum v. Brownstone*, 50 Cal. 293; refusing to direct clerk to pay to special administrator a sum allowed the latter: *In re Pote*, 72 Cal. 576; refusing to set aside an order of sale: *In re Smith*, 51 Cal. 563; setting aside a prior judgment of the same court refusing to admit a will to probate: *Peralta v. Castro*, 15 Cal. 511; *Johnson v. Tyson*, 45 Cal. 257; dismissing a petition for revocation of probate of a will: *In re Sbarboro*, 70 Cal. 147; denying motions to set aside orders and decrees made in the matter of the probate of a will: *In re Sbarboro*, 70 Cal. 147. Denying a new trial, made upon a motion to revise or vacate an unappealable order: *In re Keane*, 56 Cal. 407; appointing special administrator: *In re Carpenter*, 73 Cal. 202; see § 93, ante; directing executor to proceed and sell real estate in accordance with the original order of sale: *In re Martin*, 56 Cal. 208; *Stutmeister v. Superior Court*, 71 Cal. 322.

An appeal from a probate order, decree, or judgment, or from some specific part thereof, is taken in the same manner as other appeals to the supreme court: *In re Bowen*, 34 Cal. 682.

The petition and account are a part of the record on an appeal from a decree settling the account, without being made so by a bill of exceptions or a statement: *In re Isaacs*, 30 Cal. 105.

If the final account of an executor or administrator be disapproved by the court, he may either appeal

from the decree disallowing the same, or file another account which shall meet the objections of the court: *Rosier v. Morat*, 19 Or. 181.

The provisions of law relating to appeals on a statement or bill of exceptions apply to probate proceedings: *In re Boyd*, 25 Cal. 511.

Evidence in a probate proceeding will not be reviewed unless it is embodied in a statement on appeal: *In re Arnaz*, 45 Cal. 259.

The heirs, devisees, or legatees of an estate are parties to a proceeding for a distribution, and any of them feeling aggrieved may appeal from the final order; but the executor cannot appeal from such order on the ground that the property was improperly divided: *Bates v. Ryberg*, 40 Cal. 463; *In re Wright*, 49 Cal. 550.

On an appeal from an order removing a guardian, and appointing another in his place, taken by the guardian removed, the new guardian is a necessary party: *In re Medbury*, 48 Cal. 83.

Order compelling administrator to allow her name to be used by a creditor of the estate, in a suit to set aside a conveyance of the decedent as having been made to defraud his creditors, is not appealable: *In re Ohm*, 82 Cal. 160.

Final orders in special probate proceedings are not appealable as final judgments entered in a special proceeding, when not included in the enumeration of appeals allowed in probate matters contained in California Code of Civil Procedure, sec. 963, subd. 3 (§ 590, ante): *In re Ohm*, 82 Cal. 160.

Where a testator appointed his widow trustee of his estate, and in case of her death, before certain other trustees, named in the will, became of age, then the trust to devolve upon his son, and the widow voluntarily renounced her trust in court, and consented to the appointment by the court of her son as trustee, and upon the application of the widow and a minor trustee, such order is vacated, no appeal will lie from the order vacating the order of substitution, such order not being one of those enumerated in section 963 of the California Code of Civil Procedure (§ 590, ante): *In re Moore*, 86 Cal. 58.

Order refusing to vacate decree

of distribution is not appealable, and such appeal will be dismissed by the supreme court of its own motion, though the objection be not made by the respondent: *In re Wiard*, 83 Cal. 619.

The wife separated from her husband by agreement is not a "party aggrieved" by the action of the court in refusing, upon her petition, to arrest all proceedings and to vacate its order of distribution and discharge of the executors, though her petition state under oath that a large part of the deceased husband's estate has been concealed and withheld from administration, and she has no right to appeal from the order refusing to grant her petition: *In re Noah*, 88 Cal. 468.

An appeal from a decree of distribution will be dismissed, where it appears that the appellants had received payment in full of the distributive shares allotted to them by the decree: *In re Baby*, 87 Cal. 200.

An appeal will not lie from an order of a judge rejecting a claim against an estate: *Wilkins v. Wilkins*, 1 Wash. 87.

Upon an appeal by claimants of an estate from an order requiring the administrator to pay a family allowance to another claimant, who has been declared to be the adopted child and sole heir of the deceased, an undertaking in the sum of three hundred dollars, given as required by section 941 of the California Code of Civil Procedure, stays proceeding upon the order appealed from: *Pennie v. Superior Court*, 89 Cal. 31.

An order made after appeal has been perfected, directing the administrator to make the payment, is beyond the jurisdiction of the court, and will be annulled upon certiorari: *Pennie v. Superior Court*, 89 Cal. 31.

An appeal from a decree refusing to set aside a homestead must be taken within sixty days after the entry of the decree: *In re Harland*, 64 Cal. 379; *In re Burton*, 64 Cal. 428.

A decree of distribution will not be reviewed on an appeal by an executor or administrator, where he, as such, has no interest in the matter sought to be reviewed: *Merrifield v. Longmire*, 66 Cal. 180.

On an appeal by a legatee from a decree of distribution, the execution of the undertaking provided for by

California Code of Civil Procedure, sec. 941, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, stays proceedings upon the judgment appealed from: *In re Schedel*, 69 Cal. 241.

An order from which an appeal can be taken is to be treated as final, and is conclusive of the matter therein determined: *In re Stott*, 52 Cal. 403.

A notice appealing from all orders made by the court in a probate proceeding on a certain day is a sufficient appeal from any appealable order made on that day: *In re Pacheco*, 29 Cal. 224.

On appeal it will be assumed that the probate court had jurisdiction of a controversy where all the parties are before the court, and themselves so assume the facts to be: *In re Apple*, 66 Cal. 432.

When an error is made which injures no one the judgment will not be reversed on appeal: *In re Miner*, 46 Cal. 565.

If the court direct a resale of real property which had been previously sold and confirmed, the purchaser is a party aggrieved, and may appeal from the order under the above section and under California Code of Civil Procedure, sec. 938: *In re Boland*, 55 Cal. 310.

Judgment annulling and revoking the will as to contestant, and adjudging that contestant is not bound by the will, and that she shall take the same share as if decedent had died intestate is void, and cannot be reviewed on appeal, although, it is stipulated that no exception shall be taken to its form: *In re Freud*, 73 Cal. 555.

All appeals from the probate court must be taken to the district court: *In re Roddick*, 1 Ariz. 411.

An appeal lies to the district court from an order of the probate court settling an account, and brings the whole case for review by the appellate court, and it has power to make any order in the case which the probate court might make: *Broadwater v. Richards*, 4 Mont. 52.

From summary proceedings of a probate court determining charges of waste against an administrator, an appeal is not allowed: *Deer Lodge Co. v. Kohrs*, 2 Mont. 66.

Upon an appeal from an order confirming a sale of realty, the district court may inquire into any competent matter affecting the acts or authority of the administrator, including the proper constitution of the court itself, and qualification of the judge thereof: *Broadwater v. Richards*, 4 Mont. 80.

A territorial law providing for an appeal to the supreme court was in conflict with sections 1869 of the Revised Statutes of the United States, and is therefore null and void, and being so did not become a law under the state government subsequently organized: *In re McFarland*, 10 Mont. 445.

An order of the district court is appealable in probate matters enumerated in section 445 of the Montana Code of Civil Procedure, if it is a final determination of the rights of the parties within the meaning of said code relating to appeals in civil actions: *In re McFarland*, 10 Mont. 445.

Appeals in probate matters from the determination of district courts are now taken under the provisions of subdivision 1 of section 421 of the Montana Code of Civil Procedure, allowing appeals from a final judgment in an action or special proceeding within one year from the entry of judgment: *In re McFarland*, 10 Mont. 445.

An administrator, as such, cannot appeal from an order entering a decree of distribution: *In re Dewar*, 10 Mont. 422.

Special Administrator — Public administrator — Rights of — Preference: *Murphy v. Judge etc.*, 10 Mont. 401.

An appeal in probate to the territorial appellate court, perfected prior to adoption of state constitution, is not ousted by a constitution abolishing probate courts, and transferring matters pending therein to such appellate court for the exercise of original jurisdiction: *In re Dewar*, 10 Mont. 426.

An administrator may appeal in the same proceeding from an order of court sustaining objection to a final account, and also from an order entering a decree of distribution. An objection that thereby two separate actions have been united in one appeal is not tenable, as such orders are not actions in a legal sense: *In re Dewar*, 10 Mont. 422.

§ 578. [965.] Executors and Administrators not to Give Undertaking on Appeal.— When an executor, administrator, or guardian, who has given an official bond, appeals from a judgment or order of the superior court made in the proceedings had upon the estate of which he is executor, administrator, or guardian, his official bond shall stand in the place of an undertaking on appeal; and the sureties thereon shall be liable as on such undertaking.

Arizona. — “When an appeal is taken by an executor or administrator, no bond shall be required, unless such appeal personally concern him, in which case he must give the bond.” Rev. Stats., sec. 1300.

“When the party who desires to appeal is unable to give the appeal bond, it shall be sufficient if he file with the probate clerk, within the time prescribed for giving such bond, an affidavit in writing that he has made diligent efforts to give such bond, and is unable to do so by reason of his poverty, and such affidavit shall operate a perfection of the appeal in respect to the matter of costs.” Rev. Stats., sec. 1301.

“Upon such appeal bond or affidavit being filed in the probate clerk’s office, it shall be his duty immediately to make out a certified transcript of the papers and proceedings relating to the decision, order, judgment, or decree, and transmit the same to the clerk of the district court, together with the appeal bond or affidavit that has been made in lieu of such bond, on or before the first day of the next term of such court.” Rev. Stats., sec. 1302.

“In case the clerk of the probate court shall be unable, for want of time, to make out such transcript before the first day of the next term of the district court of the county after such appeal is taken, then such transcript shall be transmitted to the next succeeding term of such district court.” Rev. Stats., sec. 1303.

“When the transcript and appeal bond or affidavit have been received by the clerk of the district court, he shall file and number the same, and enter the case upon the civil docket of such court, to be called and disposed of in its regular order.” Rev. Stats., sec. 1304.

“All causes removed by appeal to the district court shall be tried anew as if originally brought in such court, and if no appearance is entered upon the docket for the appellee, the cause shall proceed to trial in its regular order upon the docket as if both parties were present.” Rev. Stats., sec. 1305.

“When the judgment of the district court has been rendered, a certified copy thereof shall forthwith be transmitted by the clerk of the district court to the clerk of the probate court from which the case was appealed, for the observance of such court, and the clerk of the probate court, upon receiving such certified copy of judgment, shall file the same, and record it upon the minutes of the court, and note upon the docket, and the probate judge shall make such order as may be necessary to the enforcement of such judgment.” Rev. Stats., sec. 1306.

Idaho. — Same. Rev. Stats., sec. 4332.

Nevada. — "The appeal may be taken within twenty days after the order, allowance, sentence, decree, denial, or any other official act of the probate court, or judge, is made and entered in the minutes of the court. It shall be made by filing with the clerk of the probate court a notice stating the appeal from the order, decree, judgment, sentence, or allowance, or some specific part thereof, and by executing an undertaking in the same manner and to the same effect as upon appeal from the district court to the supreme court." Gen. Stats., sec. 2967.

"The appeal of an executor or administrator to the district court, or to the supreme court, as herein provided for, who has given an official bond, shall be complete and effectual without the undertaking hereinbefore required." Gen. Stats., sec. 2979.

Utah. — "The court below may, in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator," etc. Comp. Laws, sec. 3642.

Failure to file undertaking on appeal from order revoking letters of administration is an omission for which the appeal will be dismissed, although it appears from the transcript that an order was made dispensing with the security: *In re Danielson*, 88 Cal. 480.

An appeal by an administrator from order revoking his letters is not a proceeding had upon an estate of which he is administrator, nor is he acting in the right of another in taking such appeal: *In re Danielson*, 88 Cal. 480.

An appeal from an order of distribution by an executor of a deceased heir does not entitle such executor to claim the benefit of section 965 of the Code of Civil Procedure, as to bonds on appeal, the appeal not being from an order made in the settlement of the estate of which he is executor. To entitle such executor to the benefit of section 946 of the same code, an order must be made dispensing with the bond within the time allowed for filing the bond: *In re Skerrett*, 80 Cal. 62.

§ 579. [966.] Acts of Acting Administrator, etc., not Invalidated by Reversal of Order Appointing Him. — When the judgment or order appointing an executor, or administrator, or guardian, is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed.

Idaho. — Same. Rev. Stats., sec. 4833.

Nevada. — "When an order or decree appointing an executor or administrator or guardian shall be reversed on appeal, all lawful acts in administration upon the estate performed by such executor, administrator, or guardian, if he shall qualify, shall be as valid as if such order or decree had been affirmed. When any executor or administrator resigns, or is removed, a successor may be appointed, if a necessity therefor exists, without again proving the death and residence of the testator or intestate." Gen. Stats., sec. 2980.

Utah. — Same as California. Comp. Laws, sec. 1003.

CHAPTER XXI.

ADOPTION.

- § 580. Child may be adopted.
- § 581. Who may adopt.
- § 582. Consent necessary.
- § 583. Same.
- § 584. Consent of child.
- § 585. Proceedings on adoption.
- § 586. Order of adoption.
- § 587. Effect of adoption.
- § 588. Effect on parents.
- § 589. Adoption of illegitimate child.

§ 580. [221.] Child may be Adopted. — Any minor child may be adopted by any adult person in the cases and subject to the rules prescribed in this chapter.

Arizona. — Same. Rev. Stats., sec. 1383.

Idaho. — Same. Rev. Stats., sec. 2545.

Montana. — Same. Comp. Stats., p. 587, sec. 1.

"Whenever it shall be made to appear to the satisfaction of the probate court of any county that any minor child has been deserted by its parents, or surviving parent, and that it has no legal guardian, it shall be lawful for any person desirous of adopting the said child to adopt the same according to law." Comp. Stats., p. 591, sec. 20.

Nevada. — "Any minor child may be adopted by any adult person, or by any husband and wife, in the cases and subject to the provisions prescribed in this act." Stats. 1885, pp. 29, 30, sec. 1. See also Stats. 1885, sec. 4, under § 596, *post*.

Oregon. — "Any inhabitant of this state may petition the county court in the county of his residence for leave to adopt a child not his own, and if desired, for a change of the child's name; but the prayer of such petition by a person having a husband or wife shall not be granted unless the husband or wife joins therein." Hill's Laws, sec. 2937.

"If, in a petition for the adoption of a child, a change of the child's name is requested, the court, upon decreeing the adoption, may also decree such change of name, and grant a certificate thereof, without the notices required by the preceding section." Hill's Laws, sec. 2949.

The preceding section mentioned above is under § 596, *post*.

Washington. — See next section.

Wyoming. — See next section; also Rev. Stats., sec. 1274, under § 598, *post*.

§ 581. [222.] Who may Adopt.—The person adopting a child must be at least ten years older than the person adopted.

Arizona.—Same. Rev. Stats., sec. 1384.

Idaho.—Same, except that the age is fifteen years. Rev. Stats., sec. 2546.

Montana.—Same as California. Comp. Stats., p. 587, sec. 2.

Nevada.—“The person or persons adopting a child must be at least ten years older than the child adopted; *provided*, that in the case of a husband and wife adopting a child, if only one of them shall be ten years older than the child, it shall be sufficient.” Stats. 1885, pp. 29, 30, sec. 1. See also Stats. 1885, p. 30, sec. 3, under next section.

“The provisions of this act shall not apply to any Mongolian, either as the adopting or adopted party.” Stats. 1885, p. 31, sec. 10.

Washington.—“Any inhabitant of this state not married, or any husband and wife jointly, may petition the superior court of their proper county for leave to adopt a minor child, not theirs by birth, and for a change of name of said child.” Gen. Stats., sec. 1418.

Wyoming.—“Any person may appear before the judge of probate of the county where he or she resides, and offer to adopt any minor child as his or her own; *provided*, such minor, and his or her parents, if living, or guardian, if any, or county commissioners, as hereafter provided, shall appear and consent to such adoption.” Rev. Stats., sec. 2275.

§ 582. [223.] Consent Necessary.—A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife; nor can a married woman, not thus separated from her husband, without his consent, provided the husband or wife, not consenting, is capable of giving such consent.

Managers of orphan asylums may give consent when. Cal. Stats. 1877-78, p. 963, sec. 1.

Arizona.—Same. Rev. Stats., sec. 1385.

Idaho.—Same. Rev. Stats., sec. 2547.

Montana.—Same. Comp. Stats., p. 587, sec. 3.

Nevada.—“A married man not lawfully separated from his wife, or a married woman not thus separated from her husband, cannot adopt a child without the consent of the other spouse; *provided*, the husband or wife not consenting is capable of giving such consent.” Stats. 1885, p. 30, sec. 3.

Oregon.—Certain corporations may give consent when. Laws 1889, pp. 39-40.

Washington.—“If the petition be filed by husband and wife, the court shall examine the wife, separate and apart from her husband, and shall refuse leave for such adoption, unless the court shall be satisfied from such examination that the wife, of her own free will and accord, desires such adoption.” Gen. Stats., sec. 1419.

Wyoming.—See Rev. Stats., sec. 2275, under § 588, *ante*.

An orphan child cannot be adopted, if it has for the period of one year been supported wholly at the expense of an orphan asylum, without the consent of the managers of the asylum, given in the same manner that parents are authorized to consent to the adoption of their children. The California act of 1878 does not repeal or amend any

part of the Civil Code, but provides for the adoption of a class of minor children not provided for by the code. The power to adopt minor children is a creation of the statute, and the mode prescribed by it is the measure of the power and jurisdiction of the court to decree an adoption; *Ex parte Chambers*, 80 Cal. 216.

§ 583. [224.] **Consent Necessary.** — A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery, or of cruelty, and for either cause divorced, or adjudged to be an habitual drunkard, or who has been judicially deprived of the custody of the child on account of cruelty or neglect.

Arizona. — Same; last clause omitted. Rev. Stats., sec. 1386.

Idaho. — Same to and including "neglect"; then as follows: "If it can be shown satisfactorily to the judge that the parent or parents have abandoned, or ceased to provide for its support, then it may be adopted by the written consent of its legal guardian. If no guardian, then its nearest relative. If no relative, then by consent of some person appointed by the judge to act in the proceedings as next friend to such child." Rev. Stats., sec. 2548.

Montana. — Same as California; last clause omitted. Comp. Laws, p. 587, sec. 4.

Nevada. — "A legitimate child cannot be adopted without the consent of its parents, if they be living and known, nor an illegitimate child without the consent of its mother, if she be living and known, and not without the consent of the father of such illegitimate child also, if he be living and known, and if he shall have adopted such illegitimate child as his own, by the acts and in the manner prescribed by section 9 of this act; *provided*, that such consent shall not be necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery, or cruelty, abandonment, or for either of said causes divorced, or adjudged to be an habitual drunkard, or has been judicially deprived of the custody of the child on account of adultery, drunkenness, cruelty, or neglect; *and provided further*, that no child over the age of twelve years shall be adopted without his or her own consent in writing." Stats. 1885, p. 30, sec. 4.

Oregon. — "The parents of the child, or the survivor of them, shall, except as herein provided, consent in writing to such adoption. If neither parent is living, the guardian of the child, or if there is no guardian, the next of kin in this state, may give such consent; or if there is no next of kin, the court may

appoint some suitable person to act in the proceedings as next friend of the child, and to give or withhold such consent." Hill's Laws, sec. 2938.

"If either parent is insane, or imprisoned in the state prison under a sentence for a term not less than three years, or has willfully deserted and neglected to provide proper care and maintenance for the child for one year next preceding the time of filing the petition, the court shall proceed as if such parent were dead, and, in its discretion, may appoint some suitable person to act in the proceedings as next friend of the child, and give or withhold the consent aforesaid." Hill's Laws, sec. 2939.

"If a parent does not consent to the adoption of his child, the court shall order a copy of the petition and order thereon to be served on him personally, if found in the state, and if not, to be published once a week for three successive weeks in such newspaper printed in the county as the court directs, the last publication to be at least four weeks before the time appointed for the hearing. Like notice shall also be published when a child has no parent living, and no guardian or next of kin in this state. The court may order such further notice as it deems necessary or proper." Hill's Laws, sec. 2940.

Certain corporations may give consent when. Laws 1889, pp. 39, 40.

Wyoming. — "Where both the parents of any minor child are dead, and there are no relatives of such minor known, or being unwilling to take charge of and assume control of such child, the county commissioners of the proper county, upon information or otherwise, may provide for the adoption of such child in the same manner as the parent, if living, could under the provisions of this chapter. In any case of parents abandoning their children without providing for their support and education, the county commissioners shall have the same authority to act as in case of parents' death; *provided*, that if the residence of the parents is known, the county commissioners shall notify them to take away or provide for their children, and if the parents do not claim such children within three months after such notice is given, the county commissioners shall have authority to provide for the children's adoption as in case of parents' death, or to bind them out to suitable persons under a written agreement by the county in caring for them, and paying the parties having adopted or taken them in charge a reasonable compensation for their support while in charge of such parties; *provided*, that such reclamation shall be made with the consent of the parties having adopted or taken them in charge, and not otherwise." Rev. Stats., sec. 2282.

"Parents and relatives may reclaim their children after such action has been taken, by appearing before the judge of probate of the county and giving him satisfactory evidence of their ability, or bond for the support of such children in the future, and by paying into the county treasury the amount of expenses incurred by the county in caring for them, and paying the parties having adopted or taken them in charge a reasonable compensation for their support while in charge of such parties; *provided*, that such reclamation shall be made with the consent of the parties having adopted or taken them in charge, and not otherwise." Rev. Stats., sec. 2283.

When the parents are living, of their child must be given, and is a prerequisite to jurisdiction: *Ferguson v. Jones*, 17 Or. 204.

§ 584. [225.] Consent of Child.—The consent of a child, if over the age of twelve years, is necessary to its adoption.

Arizona.—Same. Rev. Stats., sec. 1337.

Idaho.—Same. Rev. Stats., sec. 2549.

Montana.—Same. Comp. Laws, p. 587, sec. 5.

Oregon.—Same, except that the age of child is "fourteen." Hill's Laws, sec. 2941.

Washington.—"A written consent must be given to such adoption by the child, if of the age of fourteen years, and by each of his or her living parents who is not hopelessly insane or a confirmed drunkard. If there be no such parents, or if the parents be unknown, or shall have abandoned such child, or if such parents, or either of them, are hopelessly insane, or a confirmed drunkard, then by the legal guardian; if there be no such guardian, then by a discreet and suitable person appointed by said court to act in the proceedings as the next friend of such child; *provided, however*, that if the parents are living separate and apart, the consent of both is not required, but such consent may be given by the parent having the care, custody, and control of such child." Gen. Stats., sec. 1418.

Wyoming.—"In case the parent of any child is a non-resident of this territory, or shall have removed from the county in which his or her child may be at the time it is proposed to adopt the same as aforesaid, the written consent of such parent, properly acknowledged, shall be obtained and filed with the said judge of probate, which shall have the same effect as if such parent were personally present and consented to such adoption. And said judge of probate shall note the filings of such written consent in his record of approval, and the like proceedings shall be had as if such parent were present." Rev. Stats., sec. 2279.

§ 585. [226.] Proceedings on Adoption.—The person adopting a child, and the child adopted, and the other persons, if within or residents of this state, whose consent is necessary, must appear before the judge of the superior court of the county where the person adopting resides, and the necessary consent must thereupon be signed, and an agreement be executed by the person adopting, to the effect that the child shall be adopted and treated in all respects as his own lawful child should be treated. If the persons whose consent is necessary are not within or are not residents of this state, then their written consent, duly proved or acknowledged according to sections eleven hundred and eighty-two and eleven hundred and eighty-three of this code, shall be filed in said superior court at the time of the application for adoption.

Arizona. — Same. Rev. Stats., sec. 1388.

Idaho. — Same to and including the word "treated"; then as follows: "But if the parent or guardian of the child, or either of them, is a non-resident of the county where the application is made, such non-resident parent or guardian may execute his consent in writing, and acknowledge the same before any officer authorized by the laws of this territory to take acknowledgments of deeds, which consent, being filed in court where the application is made, is deemed a sufficient appearance on the part of such non-resident. Rev. Stats., sec. 2550.

Montana. — Same as California. Comp. Laws, p. 587, sec. 6.

Nevada. — "The person or persons adopting a child, and the child adopted, and the other persons, if known, if within or residents of this state, whose consent is necessary, must appear before the district judge of the county where the person or persons adopting reside, and the necessary consent must thereupon be signed, and an agreement be executed by the person or persons adopting, to the effect that the child shall be adopted and treated in all respects as his, or her, or their own lawful child should be treated, including the rights of support, protection, and inheritance." Stats. 1885, p. 30, sec. 2.

"If the persons whose consent is necessary to the adoption of a child are not within this state, their consent in writing, if they be known, and their whereabouts can be ascertained, must be obtained and filed with the judge, duly executed and acknowledged in like manner as conveyances of real estate are required to be executed and acknowledged; *provided*, that if the judge shall find that the person or persons whose consent is required have abandoned such child, or if such persons are unknown, or their whereabouts cannot be ascertained, then, in that case, the judge may, in his discretion, proceed to make the order of adoption without such consent, but in that case it shall be the duty of the judge to cause to appear before him, by citation or otherwise, the persons in whose custody the child is, and may also bring before him, in his discretion, such of the next friends of the child as he may deem proper, and shall examine them under oath, and if he deem it for the best interests of the child, he shall make the order of adoption." Stats. 1885, p. 31, sec. 7.

"The district judge shall file in the office of the county clerk all papers presented before him, or copies thereof, in the matter of the adoption of any child, and shall cause the order of adoption to be entered in the minutes of the district court of the county where the proceeding is had, and a certified copy of such minute entry to be filed and recorded in the office of the county recorder of said county, and such records shall be notice to the world of such adoption of the child." Stats. 1885, p. 31, sec. 8.

Wyoming. — "A parent willing to relinquish all right to his or her minor child to any other person willing to adopt the same shall make application to the judge of probate of the county in which such parent resides; and if such judge of probate, after due investigation, shall be satisfied that the person making such application is entitled to make such relinquishment, and that the person proposing to adopt such child is a suitable person to assume the relation of parent, and that the consent of both parties to such adoption is mutual

and voluntary, he shall enter of record in the records of his office the fact of such application and consent, with his approval of such agreement and adoption." Rev. Stats. 1887, sec. 1274.

Form No. 272.—Petition for Leave to Adopt a Minor.

In the — court of the — county of —, state of —.

In the matter of the application of — and — to adopt —, the minor child of — and —.

The petition of — and — respectfully represents to this honorable court as follows:—

1. That the petitioners are married and are husband and wife; that said — is of the age of — years; and that said — is of the age of — years;

2. That said petitioners are desirous of adopting one —, a minor, as their own child; that the age of said minor is — years; (if said child is of sufficient age, so that the law requires his consent, state as follows:) that said minor child consents to such adoption by petitioners; that said consent is in writing and is filed herewith;

3. That the parents of said minor child are — and —, and they consent that such adoption be made by petitioners; that such consent is in writing and is filed herewith; (if one parent is dead, insane, etc., state as follows:) that said —, the father of said child is dead (insane, etc.);

4. That it is for the best interest of said minor child that it should be adopted by petitioners;—

Wherefore petitioners pray that an order of this court be given, made, and entered herein that petitioners have adopted said —, and that hereafter said minor child shall be treated in all respects as their own lawful child should be treated, including the right of support, protection, and inheritance.

—, Petitioner.

—, Petitioner.

Dated —, 18—.

Form No. 272.—Consent.

(Title of court, etc., as in last form.)

We, the undersigned, hereby consent that —, the minor

ing that the child shall henceforth be regarded and treated in all respects as and have all rights, including the right of support and of protection and of inheritance, of a lawful child of the person or persons so adopting the child." Stats. 1885, p. 30, sec. 5.

Oregon. — "If, upon such petition so presented and consented to, the court is satisfied of the identity and relations of the persons, and that the petitioner is of sufficient ability to bring up the child, and furnish suitable nurture and education, having reference to the degree and condition of the parents, and that it is fit and proper that such adoption should take effect, a decree shall be made setting forth the facts, and ordering that from the date of the decree the child shall, to all legal intents and purposes, be the child of the petitioner." Hill's Laws, sec. 2942.

Washington. — "Upon the compliance with the foregoing provisions, if the court shall be satisfied of the ability of the petitioner or petitioners to bring up and educate the child properly, having reference to the degree and condition of the child's parents, and shall be satisfied of the fitness and propriety of such adoption, the court shall make an order setting forth the facts, and declaring that from that date such child, to all legal intents and purposes, is the child of the petitioner or petitioners, and that the name of the child is hereby changed." Gen. Stats., sec. 1420.

Wyoming. — "In all cases where an offer is made to adopt any minor, and consent obtained, as provided in the last preceding section [Rev. Stats., sec. 2275, under § 594, *ante*], the judge of probate, after due investigation, if satisfied, as provided in section 2274 [under § 598, *ante*], shall make a like entry of record as therein specified, with his approval of such adoption." Rev. Stats., sec. 2276.

"If the judge of probate shall be satisfied, after the due investigation, that any person proposing or agreeing to adopt any minor child is not a suitable person to assume the relation of parent to such minor, he shall refuse to approve such adoption, and shall enter such refusal in the records of his office." Rev. Stats., sec. 2278.

An appeal lies to the supreme court of the state from the final decision of a circuit court rendered in proceedings under the act of the legislative assembly entitled "An act to confer certain powers upon certain benevolent or charitable corporations incorporated under the laws of Oregon in relation to the control and disposition of homeless, neglected, or abandoned children: *President Board of Missions v. Ah Won*, 18 Or. 338.

The important matter to be considered is the best interests of the child: *President Board of Missions v. Ah Won*, 18 Or. 338.

In cases of adoption, the power of the court was special and limited, and not exercised according to the course of the common law; and its

jurisdiction must affirmatively appear by the record as to both subject-matter and the person, notwithstanding the court is one of general jurisdiction: *In re Clark*, 87 Cal. 640.

The right of adoption is purely statutory, and unknown to the common law and repugnant to its principles; and the provisions of the statute must be strictly followed, and every condition prescribed therein strictly complied with, else the child by adoption cannot inherit from the adopting parent: *In re Clark*, 87 Cal. 640.

No transfer of rights of natural parents can be acquired by adopting parents unless the statute regulating adoption is strictly followed, and all doubts in controversies between the natural and the adopting

parents should be dissolved in favor of the former: *In re Clark*, 87 Cal. 640.

Proceedings to amend record of adoption pending the determinations, upon writ of *habeas corpus*, of the right to a transfer of the child from the custody of the adopting parties to the custody of its natural parents cannot affect the decision of the court upon the writ, which must take the record as it finds it, and determine the rights of the parties accordingly: *In re Clark*, 87 Cal. 640.

The legislature has full power to regulate the adoption of children, and may invest any person, or officer, or court, with the power of receiving, witnessing, and declaring the adoption, and prescribe the form of adoption: *In re Stevens*, 83 Cal. 322.

An order of adoption of a child is void, and affords no warrant for the detention of the child from its parents, where it appears that the parents consented to the adoption of the child by a person of one name; that the agreement to adopt is signed by another name, and that the detention is by a person whose name does not appear in the record of the proceeding, there being nothing in the record to show that the three names indicate one and the same person: *In re Clark*, 87 Cal. 640.

It is essential to the validity of an adoption that the record shall show that the person adopting a child is a resident of the county in which

the order of adoption was made: *In re Clark*, 87 Cal. 640.

The right of adoption, being in derogation of the common law, is a special power conferred by statute, and the rule is, that such statutes must be strictly construed: *Ferguson v. Jones*, 17 Or. 204.

To give a decree of the county court adopting a child any validity, such court must have acquired jurisdiction, — 1. Over the parties seeking to adopt the child; and 2. Over the child to be adopted; and 3. Over the parents of such child: *Ferguson v. Jones*, 17 Or. 204.

The natural parents are not estopped from asserting their right to the custody of their child as against an illegal order of adoption, by acquiescence in the claim of the adopting parents for several years; and the relative fitness of the respective parties to care for the child cannot be inquired into upon *habeas corpus*, if it is conceded that both parties are competent and fit persons to care for the child: *In re Clark*, 87 Cal. 640.

Although parent is not entitled to custody of child who is old enough to work and care for himself, after consenting to his emancipation, there can be no basis for such a claim, where the minor is a young child, incapable of caring for himself, because of mere consent of the parents to an illegal order of adoption: *In re Clark*, 87 Cal. 640.

Form No. 274. — Order for Adoption.

[Title of Court, etc.]

This matter having come on regularly for hearing, and it appearing that said minor, —, is now present, and the consent of —, —, and — that petitioners adopt said minor child having been signed before me and are filed herein; that said — is the father of said minor child; that said — is the mother of said minor child (that said — is the guardian of said minor child); that said minor child, —, is over the age of — years, and that his consent, in writing, to his adoption by said petitioners has been signed before me, and is filed herein; that said petitioners have filed herein an agreement, signed before me, with said minor child and with each person

whose consent has been filed herein, that said minor child shall be adopted by said petitioners, and treated in all respects as their own lawful child should be treated, including the right of inheritance; and it appearing that such adoption will be for the best interests of said minor child; that said petitioners, and said minor child, and all persons whose consent is necessary, have each appeared herein, and were examined as provided by law; that said petitioners each reside in this county;—

It is therefore adjudged that the petitioners, — and —, adopt said minor child, and from this time forward said minor child shall be treated by them in all respects as their own lawful child should be treated, including the right of inheritance, and said petitioners and said minor child shall bear towards each other the relation of parent and child.

—, Judge of the — Court.

§ 587. [228.] Effect of Adoption.—A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation.

Arizona.—Same. Rev. Stats., sec. 1390.

Nevada.—See next section.

Washington.—See next section.

Idaho.—Same as California. Rev. Stats., sec. 2552.

Montana.—Same as California. Comp. Stats., p. 587, sec. 8.

Nevada.—See next section.

Washington.—“By such order the natural parents shall be divested of all legal rights and obligations in respect to such child, and the child shall be free from all legal obligations of obedience and maintenance in respect to them, and shall be, to all intents and purposes, the child and legal heir of his or her adopter or adopters, entitled to all the rights and privileges and subject to all the obligations of a child of the adopter or adopters begotten in lawful wedlock; *provided*, that on the decease of parents who have adopted a child or children under this act and the subsequent decease of such child or children without issue, the property of such adopted parents shall descend to their next of kin, and not to the next of kin of such adopted child or children.” Gen. Stats., sec. 1421.

Wyoming.—“Upon the approval of said judge of probate being obtained as aforesaid [see Rev. Stats., sec. 2276, under § 599, *ante*], the parent or guardian or such minor child shall cease to have any control whatever over the person of such child so relinquished, or right to reclaim the same; and the person adopting such child shall exercise all the rights of a parent the same as

if such child was the legitimate offspring of such person, and shall be subject to all the liabilities incident to that relation." Rev. Stats., sec. 2277.

"Minor children, adopted as aforesaid, shall assume the surname of the persons by whom they are adopted, and shall be entitled to the same rights of person and property as children or heir at law of the persons thus adopting them, unless the rights of property should be excepted in the agreement of adoption. Rev. Stats., sec. 2286.

§ 588. [229.] Effect on Parents. — The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it.

Arizona. — Same. Rev. Stats., sec. 1391.

Idaho. — Same. Rev. Stats., sec. 2553.

Montana. — Same. Comp. Stats., p. 558, sec. 9.

Nevada. — "A child, when adopted, may take the family name of the person or persons adopting, and after adoption the persons adopting and the child shall sustain towards each other the legal relation of parent and child, and have all of the rights, including the rights of support, maintenance, protection, and inheritance, and be subject to all of the duties of that relation, and the natural parents of an adopted child are, from the time of the adoption, relieved of all parental duties toward, and all responsibility for, the child so adopted, and have no rights over it." Stats. 1885, pp. 30, 31, sec. 6.

Oregon. — "A child so adopted shall be deemed, for the purposes of inheritance of such child, and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them by lawful wedlock, except that he shall not be capable of taking property expressly limited to heirs of the body or bodies of the parent by adoption, nor property from the lineal or collateral kindred of such parents by right of representation." Hill's Laws, sec. 2943.

"The parents of such child shall be deprived by the same of all legal rights as respects the child; and the child shall be freed from all obligations of maintenance and obedience as respects his parents." Hill's Laws, sec. 2944.

"Any petitioner may appeal to the circuit court from the decree of the county court on each (such) petition, in like manner as appeals may be taken from the other decrees of that court; and any child made the subject of such petition may, by a next friend, appeal in like manner; but no bonds shall be required or costs awarded against such child or next friend." Hill's Laws, sec. 2945.

"A parent who has not, before the hearing upon a petition for the adoption of his child, had personal notice thereof, may, at any time within one year after actual notice, apply to the circuit court to reverse the decree; said court, after due notice, may, in its discretion, reverse the same if it appears that any of the material allegations in the petition were not true." Hill's Laws, sec. 2946.

§ 589. [230.] Adoption of Illegitimate Child.—The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption.

Arizona.—Same. Rev. Stats., sec. 1392.

Idaho.—Same. Rev. Stats., sec. 2554.

Montana.—Same. Comp. Stats., p. 587, sec. 10.

Nevada.—“The father of an illegitimate child by publicly acknowledging it as his own, or receiving it as such, with the consent of his wife, if he is married, into his family, or otherwise treating it as his legitimate child, thereby adopts it as such, and such child shall thereupon and thenceforth be deemed, for all purposes, legitimate from the time of its birth. The provisions of the foregoing sections of this act do not apply to such an adoption except as specified in section 4 of this act.” Stats. 1885, p. 31, sec. 9.

Wyoming.—*Agreement of adoption—Terms.*—“The contracting parties in all cases of adoption may also, in addition to the foregoing proceedings, execute an agreement particularly specifying therein the terms of such adoption, which shall be recorded in the recorder’s office of the proper county, and when so recorded it shall be binding upon both parties thereto, and the original or certified copy thereof shall be received as evidence in all proceedings relating to such adoption.” Rev. Stats., sec. 2280.

Agreements legalized.

“In all cases where a written agreement has heretofore been executed between the parents of any minor child and the person adopting the same, such agreement is hereby legalized, and both parties thereto shall be legally bound by the provisions of section 2277, except that the approval of the judge of probate shall not in such cases be necessary; *provided*, that if said agreement has not been recorded in the recorder’s office of the proper county, said parties, or either of them, shall cause the same to be so recorded before such adoption shall be legalized, as herein provided.” Rev. Stats., sec. 2281.

Penalty for abandoning child.

“Any person having the natural or lawful charge of any minor child under the age of sixteen years who shall willfully abandon such child so that such child becomes a charge upon the county wherein such abandonment took place, shall be deemed guilty of a misdemeanor, and, upon conviction, be fined in any sum not exceeding one hundred dollars, or imprisonment in the county jail for a period of time sufficient to pay such fine, at the rate of one dollar per day, should fine not be paid.” Rev. Stats., sec. 2284.

“If any person having the natural or legal charge of any such child shall abandon such child, so that such child may become a charge upon the county wherein such abandonment took place, the person so abandoning such child

shall be liable to a civil action by attachment, without undertaking, by the board of county commissioners, for all expenses that may be or have been incurred by such county in consequence of such abandonment. The affidavit for attachment and petition in the district court, or summons, if the action is in a court of a justice of peace, shall allege that the person so abandoning such minor child was a person able to support it. And if the proof shall show that the ability of such person was equal to that of any other person in the community with means no greater than of the person so abandoning such child, the allegation of ability to support such child shall be deemed proved; *provided*, that the defendant in such action may give in evidence sickness or other cause tending to lessen his or her ability to support such child." Rev. Stats., sec. 2285.

Statutes in reference to adoption of illegitimate children are to be strictly construed, as being in derogation of the common law; nor can such statutes or the code be construed as retroactive, so as to give force or effect to acts done or performed before passage of such laws which they would not have had at the time they were done or performed. The code provisions on that subject are to be liberally construed; but liberal construction does not require or authorize the enlargement or restriction of the written law: *In re Jessup*, 81 Cal. 408.

The public acknowledgment of an illegitimate child required by the above section, in order to adopt and legitimize it as the heir of its father, who is unmarried, requires that he should hold the child out to his relatives, friends, acquaintances, and the world, and acknowledge and treat it as his child in such family as he may have, and otherwise treat it as if it

were a legitimate child. The evidence in this case held insufficient to establish such acknowledgment or adoption of the petitioner by the deceased: *In re Jessup*, 81 Cal. 408.

Section 230 of the California Civil Code relates only to the legitimizing of minor illegitimate children, and confers a right of inheritance as the result of adoption, while section 1387 of the same code provides for giving illegitimate adults the capacity of inheritance, and forms no limitation upon or qualification of section 230: *In re Jessup*, 81 Cal. 408.

Legitimizing of Minor.—Illegitimate children is all that section 230 of the California Civil Code relates to; the section conferring upon such legitimized child a right of inheritance, while section 1387 of the same code provides for giving illegitimate adults the capacity of inheriting, and forms no limitation upon or qualification of said section 230: *In re Jessup*, 81 Cal. 408.

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